

No. 14981

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United States  
Court of Appeals  
for the Ninth Circuit

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H. R. OSLUND,

Appellant,

vs.

STATE FARM MUTUAL AUTOMOBILE IN-  
SURANCE CO., a corporation,

Appellee.

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Transcript of Record

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Appeal from the United States District Court for the  
District of Oregon

FILED

MAR 20 1956

PAUL P. O'BRIEN, CLERK



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Court of Appeals  
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H. R. OSLUND,

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STATE FARM MUTUAL AUTOMOBILE IN-  
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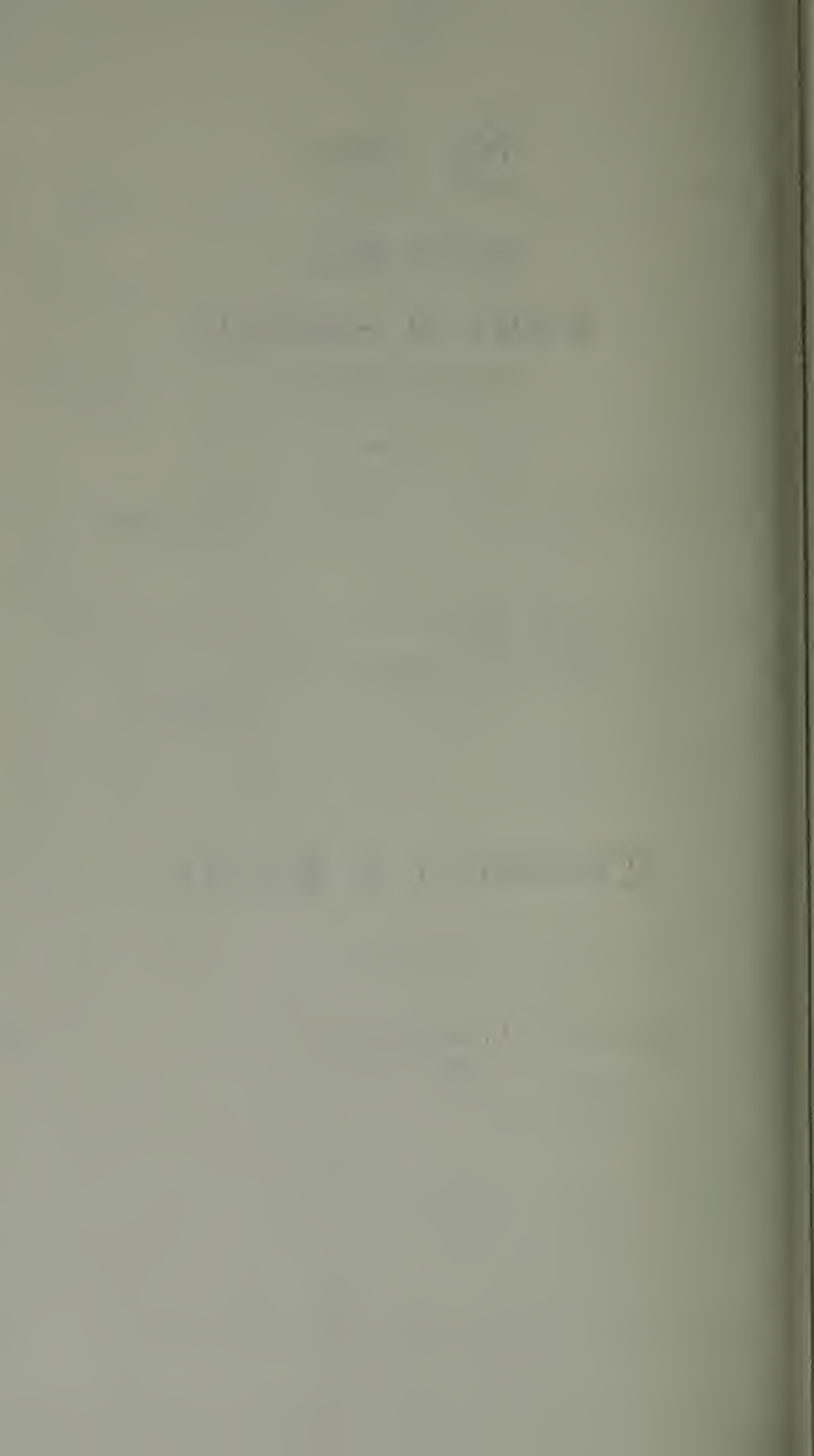
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Transcript of Record

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Appeal from the United States District Court for the  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

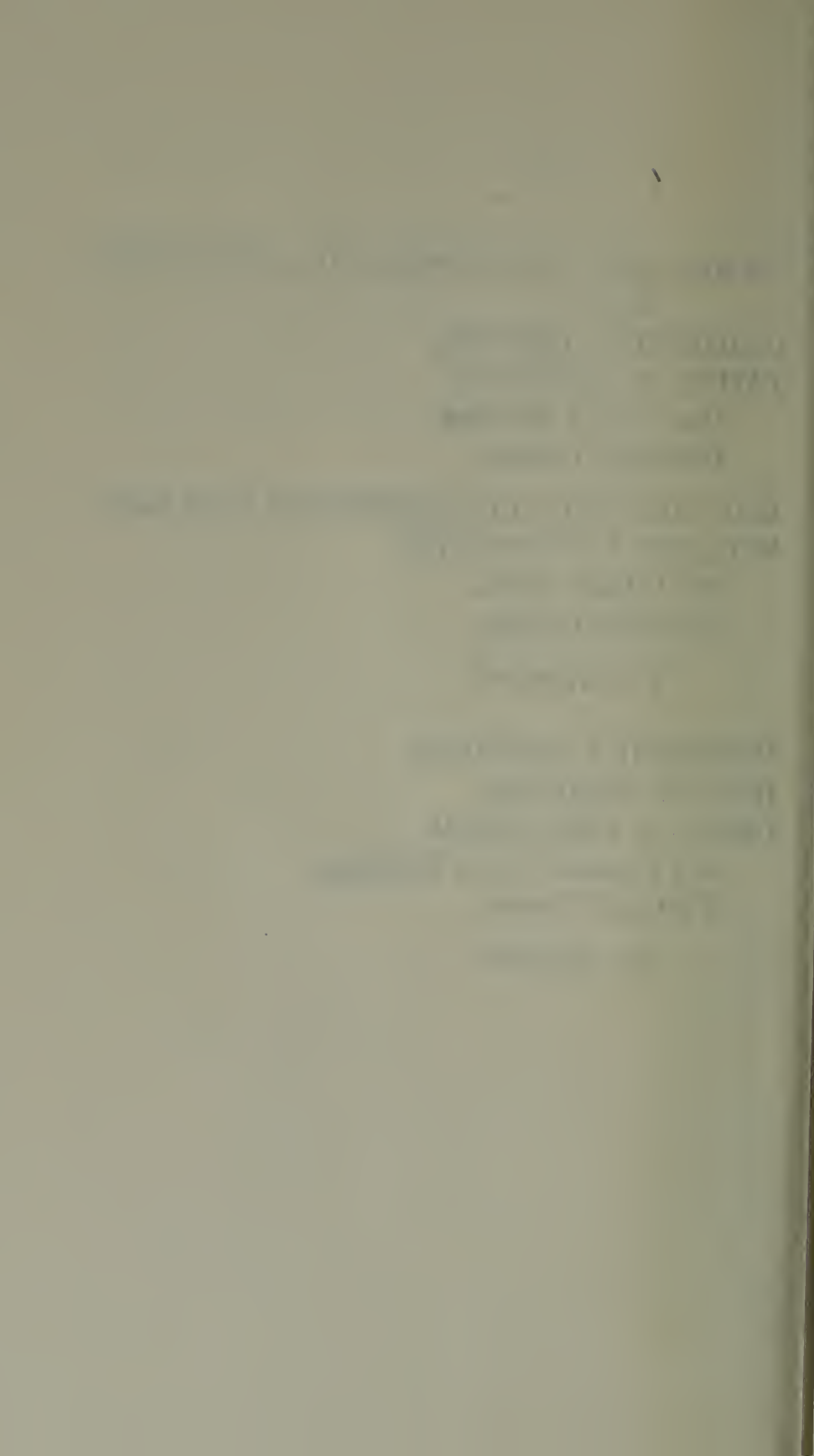
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JAMES K. GARDNER,  
Commercial Building,  
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MAGUIRE, SHIELDS, MORRISON & BAILEY,  
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Portland, Oregon,

For Appellant.

VERGEER & SAMUELS,  
DUANE VERGEER,  
CHAS. S. CROOKHAM,  
512 Portland Trust Building,  
Portland, Oregon,

For Appellee.



In the District Court of the United States for the  
District of Oregon

Civil No. 7818

H. R. OSLUND,

Plaintiff,

vs.

STATE FARM MUTUAL AUTOMOBILE IN-  
SURANCE CO., Defendant.

### PRE-TRIAL ORDER

#### Nature of Proceedings

This is an action by plaintiff upon a policy of automobile insurance, by a judgment creditor of A. L. Brock, whom plaintiff contends and defendant denies is insured under said policy.

#### Agreed Facts

1. At all times herein mentioned plaintiff was and now is a resident and citizen of the State of Oregon, and defendant was and now is a corporation incorporated under the laws of the State of Illinois and doing business within the State of Oregon.

2. The amount in controversy herein, being the amount claimed by the plaintiff and denied by the defendant, exceeds the sum of \$3,000 exclusive of interest and costs.

3. Prior to and within one year from the 22nd day of May, 1953, the defendant in consideration of the premium paid to it by Robert H. Lafky, made, executed and delivered to Robert H. Lafky, a cer-

tain automobile policy of insurance wherein said Robert H. Lafky was the named insured, and certain other persons were additional insureds when operating a certain 1948 Chrysler convertible bearing Oregon License No. 475-830, and under the terms of which policy defendant agreed to pay in behalf of said insureds all sums which the insureds should become legally obligated to pay as damages for bodily injuries within the terms of said policy of said insureds accidentally sustained on account of any accident due to the ownership, maintenance or use of the insured automobile, not to exceed the sum of \$10,000.00. Said insurance policy remained in full force and effect at all times mentioned herein.

4. On or about the 22nd day of May, 1953, while one A. L. Brock was driving the automobile above described on a public road in Washington County, Oregon, he collided with a certain Chevrolet pickup automobile, being driven and operated by the plaintiff, and as a direct and proximate result of said collision, the plaintiff suffered injuries to his person, and notice of said accident was given to said defendant herein by the named insured, and the defendant had knowledge of the same.

5. On the 22nd day of June, 1953, H. R. Oslund commenced an action in the Circuit Court of the State of Oregon for Washington County against A. L. Brock in which he made claim for damages caused by the negligence of A. L. Brock, which said action resulted in a verdict and judgment in favor of the plaintiff and against A. L. Brock in the sum

of \$19,685 together with costs and disbursements, and said judgment has never been appealed from and is a final judgment in said Court and cause.

6. No part of said judgment has been satisfied except for payment in the amount of \$5,000 by the Loyalty Group Insurance Company after trial by jury on the merits in an action by plaintiff against said Loyalty Group Insurance Company on its policy of insurance, which resulted in a verdict and judgment against said company for the sum of \$5,000.00.

7. The defendant has refused to satisfy said judgment and the same remains unsatisfied to the extent of \$14,685.00.

### Plaintiff's Contentions

1. A. L. Brock was driving said vehicle at the time of the accident with the permission of the named insured.

2. Defendant had notice of the accident between the vehicle insured by defendant and that driven by Oslund and denied coverage under its policy.

3. Defendant had notice of the pendency of the action in Washington County by H. R. Oslund against A. L. Brock and failed and refused to defend said action, although the policy of insurance issued by defendant included any person while using the automobile owned by Robert Lafky, provided the use of the automobile was with the permission of Robert Lafky.

4. Defendant investigated the accident between the vehicle insured by defendant and that driven by Oslund.

5. Defendant denied coverage under its policy on the ground that the accident arose out of the operation of an automobile repair shop.

6. Robert Lafky and A. L. Brock performed, observed and complied with all the provisions of said insurance policy required to be performed by them under the circumstances.

7. A. L. Brock was represented and defended in the Washington County action brought by H. R. Oslund, by competent counsel having the approval of the defendant and the same defenses were raised by said counsel as would have been raised by defendant.

8. More than six months has passed since the defendant had due proof of loss from said accident.

9. The sum of \$5,000 is a reasonable sum to be allowed to plaintiff as and for attorney's fees herein.

10. Plaintiff is entitled to interest at the rate of 6% per annum on the sum of \$10,000 from the 27th day of February, 1954, until such amount is paid.

#### Defendant's Contentions

1. That A. L. Brock had no permission to use said automobile except in the course of his business as a garage mechanic and operator.

2. That A. L. Brock was using said automobile at



the time of said collision in the course of his business as a garage operator.

3. That no action against this defendant lies herein until or unless as a condition precedent to the bringing thereof, A. L. Brock or his representative did forward every demand, notice, summons, or other process received by him or his representative to this defendant; and that such was not done.

4. That this defendant never received notice of the pendency of the action brought by Oslund against Brock until the time of trial thereof, and was not given an opportunity to defend the same or to compromise or settle said claim.

5. That A. L. Brock failed, after said accident, to cooperate with this defendant by giving to this defendant all information concerning said accident or the circumstances surrounding his possession of said automobile belonging to Robert Lafky, but that instead said Brock was at all times after said accident represented by counsel and dealt at arms length with this defendant.

6. That at no time did A. L. Brock or any one on his behalf forward to the defendant, or any of its representatives, any demand, notice, summons or other process received by him or his representative.

7. That the insurance above referred to is and was in all material respects identical with the sample policy form, a copy of which is attached hereto and by this reference made a part hereof as though the same are fully set forth herein at this point.

## Issues

1. Was A. L. Brock using the automobile of Robert H. Lafky with the permission of said Robert Lafky?

2. Did the accident between the automobile of Robert H. Lafky and that driven by H. R. Oslund arise out of his use thereof in the course of the operation of an automobile repair shop?

3. Did defendant have notice of the claim of H. R. Oslund?

4. Did defendant investigate the accident involved?

5. Did Brock cooperate with the defendant in investigation?

6. Did defendant deny coverage under its policy, and if so, on what ground?

7. Was Brock represented by competent counsel having the approval of defendant, and were the same defenses raised by Brock's counsel as would have been raised by defendants?

8. Did Brock submit to Company all demands, notices, summons or other process received by him or his representative?

9. Was A. L. Brock required to give further notice or make further demand upon defendant under its policy after defendant's denial of coverage, if any?

10. Did defendant have knowledge of the pendency of the Washington County action?

11. Has defendant refused to make payment under its policy of insurance for a period of six



months since notice was given of the claim of H. R. Oslund?

12. Is plaintiff entitled to any sum for attorney's fees and if so, what amount is reasonable?

13. Is plaintiff entitled to interest and from what date?

### Exhibits

The following is a schedule of the exhibits marked by the parties for identification; all objections as to the competency, relevancy and materiality are reserved to time of trial. Further identification is hereby waived of the exhibits.

#### Plaintiff's Exhibits:

1. Answer A. L. Brock personal injury case.
2. Answer A. L. Brock prepared by defendant's counsel in property damage case.
3. Complaint Oslund vs. State Farm Mutual Automobile Insurance Company, state court.
4. Deposition Ed Engel, state court.
5. Deposition Frank O'Connor, state court.
6. Copy of insurance policy issued to Robert Lafky.
7. Statement of A. L. Brock.
8. Accident report of Robert Lafky.
9. Deposition of Mervin Brink.
10. Deposition of Robert Lafky.
11. Report of Edward Engel dated Aug. 3, 1953.
12. Report of Edward Engel dated Nov. 2, 1953.
13. Report of Edward Engel dated June 10, 1953.
14. Report of Edward Engel dated Sept. 25, 1953.

15. Defendant's file cover.
16. Defendant's case record card.
17. Letter of Gardner 6-1-53.

Defendant's Exhibits:

1. Copy of insurance policy issued to Robert Lafky.
2. Statement of A. L. Brock.
3. Accident report of Robert Lafky.
4. Deposition of Mervin Brink.
5. Deposition of Robert Lafky.
6. Deposition of James K. Gardner.
7. Report of Robert Lafky.

It Is Hereby Ordered that the foregoing is the Pre-Trial Order in the above entitled cause, that it supersedes the pleadings, which are hereby amended to conform hereto, and that said pre-trial order shall not be amended until trial except by consent or by order of the court to prevent manifest injustice.

Dated this 27 day of September, 1955.

/s/ WILLIAM G. EAST

The foregoing form of Pre-Trial Order is hereby approved:

/s/ WALTER J. COSGRAVE,  
Of Attorneys for Plaintiff

/s/ DUANE VERGEER,  
Of Attorneys for Defendant

[Endorsed]: Filed September 27, 1955.

[Title of District Court and Cause.]

PLAINTIFF'S REQUESTED INSTRUCTIONS

Comes now the plaintiff and respectfully requests the court to instruct the jury as follows:

I.

Since the insurance policy in this case was prepared by the defendant State Farm Insurance Company, its terms are to be construed most strongly against said defendant and in favor of the plaintiff.

\* \* \* \* \*

IX.

I instruct you that since the defendant, State Farm Insurance Company, after investigating the accident, denied that its policy of insurance covered A. L. Brock, on the ground that the accident arose out of the operation of a garage, this denial was a waiver of the policy requirements as to notice of suit or the forwarding of any summons or other process and you are not to consider as a defense any lack of delivery of notice of suit or failure to deliver the summons and complaint.

\* \* \* \* \*

[Title of District Court and Cause.]

DEFENDANT'S REQUESTED  
INSTRUCTIONS

Comes now the Defendant State Farm Mutual Automobile Insurance Company and respectfully requests the Court to submit to the jury the Special Interrogatory attached hereto, and to instruct the jury as follows:

\* \* \* \* \*

Defendant's Requested Instruction No. 1

One of the issues raised by plaintiffs in this cause is raised upon the proposition that the Insurance Company, at a time prior to the filing of the action by Mr. Oslund against Mr. Brock, denied coverage to Mr. Brock, and that for this reason Mr. Brock was excused from tendering to the State Farm Mutual the defense of the action brought against him by Mr. Oslund. Under the insurance contract upon which plaintiff seeks to collect, any person claiming to be insured must prove before he can maintain an action against the Company that he has tendered to the Company every claim, demand and notice, including any summons or complaint which he has received or which is served upon him. Plaintiff can not be allowed to recover in this case unless he shows that either Mr. Brock performed the above requirement, which it is admitted that he did not, or that he was excused from such performance by reason of conduct on the part of the defendant herein. If Mr. Brock wanted to avail himself of

Mr. Oslund's insurance policy, it was necessary for him to comply with all the requirements of that policy, unless excused therefrom by conduct on the part of the company.

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[Title of District Court and Cause.]

### VERDICT

We, the jury, duly impanelled and sworn to try the above-entitled cause find our verdict in favor of the defendant and against the plaintiff.

Dated this 28 day of September, 1955.

/s/ CARL H. VEATCH,  
Foreman

[Endorsed]: Filed September 28, 1955.

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[Title of District Court and Cause.]

### SPECIAL FINDINGS

We, the jury, duly impanelled and sworn to try the above-entitled cause, answer the following interrogatory as appears below:

Was A. L. Brock, at the time of the accident, using Mr. Robert Lafky's automobile in the course of his business as a garage mechanic: Yes.

/s/ CARL H. VEATCH,  
Foreman

[Endorsed]: Filed September 28, 1955.



In the District Court of the United States for the  
District of Oregon

Civil No. 7818

H. R. OSLUND,

Plaintiff,

vs.

STATE FARM MUTUAL AUTOMOBILE IN-  
SURANCE COMPANY, Defendant.

### JUDGMENT

The above entitled cause having come on for trial before the Honorable William East, Judge of the entitled Court, on the 27th day of September, 1955; plaintiff appeared in person and by Walter Cosgrave and James Gardner, of counsel for plaintiff, and the defendant appeared by one of its attorneys, Duane Vergeer; a jury was duly impanelled and sworn to hear the cause, after which evidence was heard on behalf of the plaintiff and the defendant. At the conclusion of the evidence the cause was argued to the jury by respective counsel, after which the Court instructed the jury on all matters pertaining to the issues and the law applicable thereto; whereafter the jury retired to deliberate upon its verdict, and on the 28th day of September, 1955, returned its Special Findings and Verdict into Court in the following terms, to-wit:

(Title and Venue Omitted) "Special Findings: We, the jury, duly empanelled and sworn to try the above entitled cause, answer the following interrogatory as appears below:

Was A. L. Brock, at the time of the accident, using Mr. Robert Lafky's automobile in the course of his business as a garage mechanic: Yes.

/s/ Carl H. Veatch, Foreman"

(Title and Venue Omitted) "Verdict: We, the jury, duly impanelled and sworn to try the above entitled cause find our verdict in favor of the defendant and against the plaintiff.

Dated this 28th day of September, 1955.

/s/ Carl H. Veatch, Foreman"

and the defendant having moved for Judgment upon said finding, and verdict, and the Court being advised in the premises, now, therefore,

It Is Hereby Ordered and Adjudged that plaintiff's Complaint herein be and the same is hereby dismissed, and that plaintiff take nothing thereby, and that the defendant be and is hereby awarded judgment against the plaintiff for the defendant's costs and disbursements incurred herein.

Dated this 28th day of September, 1955.

/s/ WILLIAM G. EAST,  
Judge

[Endorsed]: Filed September 30, 1955.

[Title of District Court and Cause.]

## MOTION FOR NEW TRIAL

Comes now the plaintiff, by and through his attorneys of record, James K. Gardner and Walter J. Cosgrave, and respectfully moves the Court for an order setting aside the verdict of the jury herein and the judgment based thereon and granting the plaintiff a new trial. That this motion is made upon the following grounds, to-wit:

1. That the general verdict for the defendant and against the plaintiff and the special interrogatory are against the clear weight of the evidence in that it conclusively appears from the evidence that the defendant knew of the suit and denied coverage; and that there was no substantial evidence that the accident arose out of the operation of a garage.

2. There was no substantial evidence that the accident arose out of the operation of a garage, the accident report having been admitted only for purposes of impeachment and not as substantive evidence and the Court should, therefore, have withdrawn such defense from the consideration of the jury.

3. The special interrogatory to the jury presented an exclusion which was not contained in defendant's policy of insurance. The language of the policy is:

“to any person operating an automobile repair shop, public garage, \* \* \* with respect to



any accident arising out of the operation thereof.”

The question submitted was:

“Was A. L. Brock, at the time of the accident, using Mr. Robert Lafky’s automobile in the course of his business as a garage mechanic: Yes.

.....  
Foreman”

4. The instruction of the Court to the effect that the defendant must have “definitely denied” coverage and that a mere statement of opinion on the part of a representative of the insurance company was not enough to justify a finding that the company had refused coverage, was highly prejudicial to the plaintiff and did not correctly state the law.

5. Plaintiff’s requested instruction Number one should have been given since it correctly stated the law and was material to the exclusion defense raised by defendant.

6. Plaintiff’s requested instruction Number VIII should have been given since it correctly stated the law and was material to the exclusion defense raised by defendant.

7. That the defense counsel made the following statement to the jury, to-wit:

“Mr. Brock was keenly aware of the fact that he was a garage operator and that he had no longer any garage liability coverage. The record shows that his policy had lapsed and he knew about it

and he also knew that a policy such as this would not be applicable to him. Undoubtedly Mr. Brink had informed him thoroughly on the subject but that is outside of the record. Now there was a discussion between Mr. Engel and Mr. Brink——” (Objection)

That said statement was false and there was no evidence in the case to sustain the statement. That it imputed bad faith to Mr. Brock and implied that he was attempting to get coverage which he, in fact, knew he did not have. That the statement was prejudicial, and prevented the plaintiff from obtaining a fair trial.

8. That defense counsel made the following statement to the jury:

“I want to stress the point that Mr. Brock, at no time was taken advantage of; that if he wanted to perform under the policy, if he wanted to claim the privilege of the policy that was issued to Mr. Oslund—I mean to Mr. Lafky, he could do it, but he decided against doing it and now Mr. Oslund wants to come in and collect under the policy issued to Mr. Lafky for something that Mr. Brock did and now we are faced with trying to prove to you what was going on in Mr. Brock’s mind when he got into the car that day.”

That the statement was prejudicial to the plaintiff in that it suggested to the jury that Oslund should not be allowed to recover because Brock was not the owner of the policy, whereas it had been agreed that Brock was an additional assured, the question of permission having been admitted.

Dated, at Portland, Oregon, this 7th day of October, 1955.

/s/ WALTER J. COSGRAVE,  
Of Attorneys for Plaintiff

To: Defendant State Farm Mutual Automobile Insurance Company and Duane Vergeer, its attorney

Please take notice that the plaintiff will bring the above motion on for hearing on the 12th day of October, 1955, at 10:00 a.m. or as soon thereafter as counsel may be heard.

/s/ WALTER J. COSGRAVE,  
Of Attorneys for Plaintiff

[Endorsed]: Filed Oct. 7, 1955.

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[Title of District Court and Cause.]

### ORDER

This matter coming on before the Court on the 17th day of October, 1955, plaintiff appearing by James K. Gardner, of attorneys for plaintiff and the defendant appearing by Duane Vergeer, of attorneys for defendant, and the Court having heard argument upon plaintiff's Motion for a New Trial, and the Court being of the opinion that plaintiff's Motion is not well taken, and that plaintiff did in every respect have a fair and proper trial, and that no error in any way materially affecting the

rights of the parties is contained in the record, or took place during the trial, now, therefore,

It is hereby ordered that plaintiff's Motion for a New Trial be and the same is hereby denied.

/s/ WILLIAM G. EAST,  
Judge

[Endorsed]: Filed Oct. 25, 1955.

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[Title of District Court and Cause.]

#### NOTICE OF APPEAL

To: State Farm Mutual Automobile Insurance Company, a corporation, and Duane Vergeer, its attorney.

You and each of you will please take notice that H. R. Oslund, plaintiff in the above entitled case, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 28th day of September, 1955.

/s/ JAMES K. GARDNER,  
Of Attorneys for Plaintiff

[Endorsed]: Filed Nov. 14, 1955.

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH  
APPELLANT WILL RELY ON APPEAL

Comes now the appellant and presents a statement of points upon which he intends to rely in his appeal of the above entitled cause to the United States Court of Appeals for the Ninth Circuit.

1. That the general verdict for the defendant and against the plaintiff and the special interrogatory are against the clear weight of the evidence in that it conclusively appears from the evidence that the defendant knew of the suit and denied coverage; and that there was no substantial evidence that the accident arose out of the operation of a garage.

2. That the Court erred in admitting defendant's exhibit 7 over the objection of the plaintiff.

3. That there was no substantial evidence that the accident arose out of the operation of a garage and the defendant's exhibit 7 was not substantial evidence, hence the Court erred in failing to withdraw said defense from the consideration of the Jury.

4. That the Court erred in giving defendant's instruction to the effect that the defendant must have "definitely denied" coverage and that a mere statement of opinion on the part of a representative of the insurance company was not enough to justify a finding that the company had refused cov-



erage, was highly prejudicial to the plaintiff and did not correctly state the law.

5. That the court erred in failing to give Plaintiff's requested instruction No. 1. That it clearly stated the law and was material to the exclusion defense raised by the defendant and the Court's failure to give it, prejudiced the plaintiff.

6. That the defense counsel made the following statement to the jury, to-wit:

"Mr. Brock was keenly aware of the fact that he was a garage operator and that he had no longer any garage liability coverage. The record shows that his policy had lapsed and he knew about it and he also knew that a policy such as this would not be applicable to him. Undoubtedly Mr. Brink had informed him thoroughly on the subject but that is outside of the record. Now there was a discussion between Mr. Engel and Mr. Brink——" (Objection)

That said statement was false and there was no evidence in the case to sustain the statement. That it imputed bad faith to Mr. Brock and implied that he was attempting to get coverage which he, in fact, knew he did not have. That the statement was prejudicial, and prevented the plaintiff from obtaining a fair trial.

7. The court erred in failing to sustain plaintiff's objection to defense counsel's misstatement and the court erred in failing to instruct the jury to disregard it.

Dated November 18th, 1955, at Hillsboro, Oregon.

GARDNER AND REEDER  
MAGUIRE, SHIELDS, MORRISON  
& BAILEY

/s/ By JAMES K. GARDNER,  
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Nov. 22, 1955.

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[Title of District Court and Cause.]

### CERTIFICATE OF THE CLERK

United States of America,  
District of Oregon—ss:

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Pre-trial order; Plaintiff's requested instructions; Defendant's requested instructions; Verdict; Special findings; Judgment; Plaintiff's motion for new trial; Order denying motion for new trial; Notice of appeal; Bond for costs on appeal; Designation of contents of record on appeal; Statement of points upon which appellant will rely on appeal; Appellee-Defendant's supplemental designation of contents of record on appeal; Stipulation to strike item from designation; Order to forward exhibits to Court of Appeals and Transcript of docket en-

tries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 7818, in which H. R. Oslund is the plaintiff and appellant and State Farm Mutual Automobile Insurance Co. is the defendant and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant and the appellee, and in accordance with the rules of this court.

I further certify that there is enclosed the reporter's transcript of testimony in three parts, together with exhibits 6, 7, 11, 12, 13, 14, and 17.

I further certify that the cost of filing the notice of appeal, \$5.00 has been paid by the appellant.

In testimony whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 19th day of December, 1955.

[Seal]

R. DE MOTT,  
Clerk.

/s/ By F. L. BUCK,  
Chief Deputy



[Title of District Court and Cause.]

PARTIAL TRANSCRIPT OF PROCEEDINGS

Portland, Oregon, September 28, 1955

Before: Honorable William G. East, District Judge.

ARGUMENT OF DUANE VERGEER

\* \* \* \* \*

I am going to talk first of all about Mr. Engel. Mr. Engel's background and experience has been made clear to you. He is an employee of the company, there is no issue on that question. Mr. Engel is an adjuster; he had had about a year's experience at the time this thing came along. Now, Mr. Engel had taken a statement from Mr. Brock. He had also obtained a report from Mr. Lafky and that report is in evidence and parts of the statement were made known to you and I will have reference to them later. But, he then went to see Mr. Brink and, according to the deposition as Mr. Brink recalled it, Mr. Engel was in talking to his partner about something and he got to kidding him about this Brock accident. Now, mind you Mr. Brink who is an experienced attorney and you saw him here was then representing Mr. Brock and we don't need to concern ourselves with the idea that Mr. Brock was being taken advantage of in any way whatsoever. Mr. Brock had already seen his attorney before Mr. Engel saw him and Mr. Engel then proceeded to see Mr. Brink after that and also

Mr. Brock after that. It's something to keep in mind because it may have colored his thinking a little bit. Mr. Brock was keenly aware of the fact that he was a garage operator and that he had no longer any garage liability coverage. The record shows that his policy had lapsed and he knew about it and he also knew that a policy such as this would not be applicable to him. Undoubtedly Mr. Brink had informed him thoroughly on the subject but that's outside of the record. Now, then, there was a discussion between Mr. Engel and Mr. Brink—

Mr. Gardner: Your Honor.

The Court: Just a moment.

Mr. Gardner: I don't think there is any evidence in this case about any policy having lapsed.

Mr. Vergeer: I believe the matter was mentioned by a witness, Your Honor.

The Court: May I have the statement of counsel read?

(The portion of Mr. Vergeer's previous statement, the sentence starting "The record shows that his policy had lapsed . . ." and down to the portion where Mr. Vergeer was interrupted by Mr. Gardner's objection was read.)

The Court: There was some evidence in the case to the effect that Mr. Brock had insurance of his own and counsel can draw such inferences from that evidence as they desire. The jury understands

that counsel is merely drawing his inference and analysis of the evidence.

\* \* \* \* \*

[Endorsed]: Filed October 17, 1955.

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[Title of District Court and Cause.]

PARTIAL TRANSCRIPT OF PROCEEDINGS

Portland, Oregon, September 27th and 28th, 1955

Before: Honorable William G. East, District Judge.

Mr. Gardner: I would like to call Mr. Brock.

A. L. BROCK

produced as a witness on behalf of the plaintiff, being first duly sworn, was examined, and testified as follows:

Direct Examination

By Mr. Gardner:

Q. Would you state your name for the Court and jury again? A. A. L. Brock.

Q. And, where do you live, Mr. Brock?

A. At Hillsboro.

Q. And, where are you presently living in Hillsboro? A. At the present time?

Q. Yes.

A. I am living a half a mile east of Hillsboro.

Q. And, could you state whether or not you are living next to your garage at the present time?

(Testimony of A. L. Brock.)

A. No, sir—I didn't quite hear you on that.

Q. Could you tell us whether or not you are living next to your garage at the present time?

A. At the present time, yes.

Q. And, where is your garage located?

A. About a half a mile east of Hillsboro on Highway 6.

Q. I wonder if the jury can hear him. Would you talk just a little louder, Mr. Brock, and address your answers right to the jury? Could you tell us whether or not this Highway 6 is the main highway between Beaverton and Hillsboro?

A. It is; yes.

Q. And, which side of the road is your garage on?      A. Right on the north side.

Q. And, how long have you operated that garage, Mr. Brock?

A. I moved out there in the spring of '50.

Q. And, have you operated the same garage there since 1950?      A. Yes, sir.

Q. How large a garage is it?

A. Just two stall.

Q. And, you normally employ any help in the operation of it?

A. Oh, from time to time, yes.

Q. And, is that an occasional person that helps you out from time to time?      A. Yes.

Q. Now, could you state whether or not you had anyone working for you on May 22, 1953?

A. No, I didn't. I did not.

(Testimony of A. L. Brock.)

Q. And, where were you living on May 22, 1953?

A. 4th and Grant Street, Hillsboro.

Q. And, you were operating the garage that day?

A. Yes.

Q. Do you know a Robert H. Lafky?

A. I do, yes.

Q. And, approximately how long have you known Mr. Lafky?

A. I believe since the fall of '51.

Q. And, how did you happen to become acquainted with him?

A. Well, he was a tenant in my house at one time.

Q. And, that was for what period of time?

A. Oh, I would say eight or ten months.

Q. During that period of time did you form quite a close personal attachment for Mr. Lafky?

A. We did.

Mr. Vergeer: I object to the form of the question.

The Court: I believe the question calls purely for a conclusion. Have the witness explain what the relationship was.

Mr. Gardner: Thank you, Your Honor.

Q. Would you explain to the jury, please, just what your relationship was during the time Mr. Lafky lived in the house you rented to him?

A. Well, we became very good friends. We visited back and forth considerably and we were out together a few times.

Q. Well, now, during this period of time that



(Testimony of A. L. Brock.)

Mr. Lafky lived in your house where were you living?

A. In a trailer house in the back yard.

Q. Was that in the back yard of the house that he was living in?      A. It was, yes.

Q. Would you give the jury some idea of the distance in feet as to where your front door and his back door were from each other?

A. Oh, probably 20 feet.

Q. Yes. During that time did you have occasion to take some meals with Mr. Lafky and his family?

A. I did.

Q. And, during that time did you ever have occasion to exchange automobiles?

A. We had on occasions, yes.

Q. Now, during the time that Mr. Lafky was renting from you did you have occasion to keep his car repaired?      A. Yes, I did.

Q. And, at times previous to the accident could you state whether or not you had used his car for personal errands when it was left at your shop?

A. I had, yes.

Q. Now, recalling back on the 22nd of May, 1953, I believe that that was a Friday, did you receive possession of Mr. Lafky's car?

A. Yes, I did.

Q. And, about what time of day was it that you obtained possession of it?

A. It was about 9:00 o'clock in the morning.

Q. And, will you tell the jury just how that happened that day?

(Testimony of A. L. Brock.)

A. Well, his car needed a minor tune up which I had given his car several times and so he drove the car out there in the morning, I took him back uptown, and drove the car back to the shop.

Q. And, about what time was it that you returned back to the shop from Hillsboro?

A. Oh, it was shortly after 9:00 o'clock.

Q. Did you do any work on his car?

A. Just minor tune up. It was a matter of checking the ignition, and so on; just a minor tune up.

Q. About how much time did you spend in repairing it?

A. Oh, probably not to exceed a half an hour.

Q. And, do you recall at what time you had the repairs completed?

A. Well, immediately after—immediately after I took the car back out there I completed the repairs and gave the car a road test and set it along in the parking lot out in front.

Q. And, about what time was it that you set it on the parking lot?

A. Oh, around 10:00 o'clock.

Q. And, then, what did you do?

A. Well, worked on other jobs.

Q. And, could you tell the jury what happened just previous to the accident that afternoon?

A. I don't quite understand what you're asking for.

Q. Well, did you have occasion to leave your shop at any time Friday, May 22, '53?

(Testimony of A. L. Brock.)

A. Yes. Yes, I did. I had an errand down the road and I wasn't busy in the shop at that time so I went on this errand.

Q. About what time was it that you decided to go on an errand?

A. Oh, it was some time after 2:00 o'clock in the afternoon.

Q. And, at that time was there anyone in the shop helping you?           A. No.

Q. Would you tell the jury just what you did after you decided to go on the errand some time after 2:00 o'clock?

A. Well, I got in Mr. Lafky's car and drove down to this man's place which is near Witch Hazel. It's over——

Q. Do you recall the name of the man that you went to see?

A. Yes. His name was Thomison.

Q. And, what was your purpose, if any, in going down to see Mr. Thomison?

A. Well, I had been getting eggs from him for several years and I went down after a couple of dozen eggs.

Q. Do you recall what route or what road you took from your garage down to see Mr. Thomison?

A. Well, I drove from the garage down to the Minter Bridge Road and I crossed to the River Road and then east to Mr. Thomison's place.

Q. And how did you come back?

A. The same route.

Q. Now, as you approached the intersection of



(Testimony of A. L. Brock.)

Minter Bridge Road and Highway 6 what direction were you going?           A. I was going north.

Q. And, where were you in reference to Hillsboro?

A. Well, the Minter Bridge Road, I should judge, is in the neighborhood of three-quarters of a mile east of the city limits.

Q. I see. And, where was your garage in reference to where you were on Minter Bridge Road and east boundaries of Hillsboro?

A. Probably a quarter of a mile west of this intersection.

Q. Well, am I to understand, then, that your garage was practically in line with you and the east boundaries of the City of Hillsboro?

A. That's right.

Q. Now, as you turned onto the Highway Number 6 could you tell us what direction you turned?

A. Well, I would be turning west onto the highway.

Q. And, what happened as you turned west?

A. Well, I started to turn west and saw Mr. Oslund and I made a stop.

Q. And, is that where the accident occurred then at that intersection?

A. That's where the accident occurred.

Q. Then, after the accident happened what, if anything, did you do with Mr. Lafky's car?

A. I called a tow truck and had it towed up to the shop.

Q. To what shop?           A. My shop.

(Testimony of A. L. Brock.)

Mr. Gardner: I think that's all at this time.

Mr. Vergeer: If the Court please, does the Court have the exhibit consisting of the statement of A. L. Brock? It's numbered—

Mr. Cosgrave: No. That's the one we marked, Mr. Vergeer. You have the original of it, we have a Photostat.

Mr. Vergeer: All right. Then, I would like this marked as Defendant's Exhibit Number 2.

(Whereupon statement of A. L. Brock was marked Defendant's Exhibit 2 for identification.)

#### Cross Examination

By Mr. Vergeer:

Q. Mr. Brock, you testified just now that you did some work on the ignition on that car that morning?           A. Yes, sir.

Q. And, that you then went out and road tested it?           A. Yes, sir.

Q. And, that you then put it on the parking lot?

A. That's right.

Q. Is that right?

A. That's right.

Q. Is that what you did?           A. Yes, sir.

Q. Do you recall Mr. Brock when your statement was taken in the course of a conversation between you and Mr. Clifford R. Waits, Court Reporter, and Mr. Ed Engel, on the 27th day of May, 1953, shortly after this accident about three or four or five days after the accident? Do you recall that?

A. Yes, I recall that.

(Testimony of A. L. Brock.)

Q. All right. Now, I will ask you, Mr. Brock, if at that time concerning this matter you weren't asked the following questions and made the following answers—page 4—“You had driven the car before”—referring to the Brock car—“I mean, the Lafky car? Oh, yes; this particular car, yes. Question: Do you normally make a practice of testing cars before——? Answer: Sometimes I do sometimes I do but in this case I didn't because all I did was tune up his ignition and then backed her out and set it out there for a couple of hours after I was through with it. And I had to go down and see this man and I locked up shop and drove down.” Now, having that to refresh your memory do you think you road tested that car between the time you tested the ignition and the time you went on this trip? A. I am of the opinion I did, yes.

Q. You think then that your statement made at this time on the 27th of May, 1953, was incorrect, is that so? You do not deny making this statement, do you?

A. No, I don't deny making the statement.

Q. All right. Now, do you recall an occasion when your deposition was taken in the case in the Circuit Court of the State of Oregon for the County of Washington in the case of Oslund against Brock, deposition of A. L. Brock, taken on September 5, 1953, at 11:00 o'clock a.m. in the Circuit Courtroom at Hillsboro, Oregon, before Judge R. Frank Peters and Mr. Gardner your attorney was present and Mervin W. Brink was present. Do you recall that?

(Testimony of A. L. Brock.)

A. I recall it.

Q. At that time were you asked the following questions and did you make the following answers concerning this point: "Question: On May 22, 1953, how did you happen to obtain possession of his car? Answer: Well, I had his car in in the morning and had changed spark plugs. Question: And—— Answer: Then I had set his car outside. I set his car outside and it sat there until that afternoon. Question: Now, did you bring his car in that morning? Answer: Yes, sir. Question: About what time did he come, in the morning? Yes. I won't say. I don't remember." Do you deny making that statement?

A. No.

Q. And, your present recollection, however, is that the car didn't set there until you took it on this trip but that you road tested it in between time?

A. It's my impression that I road tested the car when I backed out of the shop, that's the impression that I have.

Q. At this time?

A. I—it was—it was a minor tune up. There wasn't any job card made out on it so I haven't any reference on that particular job.

Q. The fact is, then, Mr. Brock, that you want this jury to understand now that you are not sure in your own mind whether you did that one way or the other, is that right?

A. I am positive in my own mind that I road tested the car when I backed out of the shop in the morning.

(Testimony of A. L. Brock.)

Q. And, that you were mistaken in each of these two prior occasions?      A. Uh huh.

Q. Now, Mr. Brock, you were under oath when this second statement was made, weren't you?

A. That's right.

Q. Mr. Brock, do you normally consider road testing it part of your business when you tune up an automobile with ignition trouble?      A. I do.

Q. As a matter of fact, until the car is driven at some speed you can't tell whether you have done a good job or not, isn't that right?

A. That's right.

Q. And, sometimes you have to drive a car very slowly to find out whether it's right or not?

A. Right.

Q. And, so, actually taking the car for a road trip is a necessary part of tuning it up?

A. Right.

Q. Now, your own car was on the lot that day, wasn't it; that afternoon?      A. Yes.

Q. And, you say in your testimony that Mr. Oslund sometimes used your car prior to this occasion, is that right?      A. That's right.

Q. And, that was——

Mr. Cosgrave: I think you have your names crossed again.

Mr. Vergeer: Pardon me. I am sorry—that Mr. Lafky used your car on occasions?

A. Right.

Q. And, that was, however, only when Mr.



(Testimony of A. L. Brock.)

Lafky's car was laid up for some reason, isn't that right?

A. I wouldn't—I wouldn't say that it was only when his car was laid up. He felt free to use my car at any time he wanted to. So I wouldn't say that that was only when his car was laid up.

Q. And, when you used his car you would ask his permission to use it, wouldn't you?

A. Oh, I'd say on occasion, yes.

Q. And, except of course if you had it at your garage and were working on it?

A. Well, I had taken his car from the house without his permission.

Q. You had?           A. Yes.

Q. How often do you think you had done that?

A. Oh, I can recall of a couple of times when I did.

Q. You can recall a couple of times? Now, Mr. Brock, were you going to return this car to Mr. Lafky?           A. In the evening, yes.

Q. And, at the time of the accident, as I understand it, you were on your way back to the shop?

A. Right.

Q. What kind of clothes were you wearing, Mr. Brock?

A. Well, I had pulled off my coveralls. I had on my ordinary pants and shirt.

Q. Yes. You had taken your coveralls off?

A. Right.

Q. And, didn't you at one time tell Mr. Engel when he came out on the occasion previously re-



(Testimony of A. L. Brock.)

ferred to that you were not going back to the shop that afternoon?

A. No, I didn't. I didn't make that statement.

Q. You didn't think you made such a statement? A. (Witness shakes head.)

Q. What time do you normally close your shop, Mr. Brock?

A. Oh, around 5:00 o'clock.

Q. Referring to page 8, Defendant's Exhibit Number 2, do you recall on the occasion when the Court Reporter was out with Mr. Engel you were asked these questions about this matter of whether you were going back to work and immediately prior thereto, these others: "Question: Do you return cars for your customers? Answer: Sometimes. Question: Do you pick up cars for your customers? Answer: Sometimes. Question: Do you consider that part of the normal occupation for a mechanic? Answer: In a way, yes. Question: That is part of the business? Answer: That is part of the business in a way. Question: You were actually carrying on your normal business pursuits at the time the accident occurred? Answer: No. I was through with my normal pursuits. As far as that is concerned I was through working for the day. I had pulled off my coveralls and washed up and was ready for home. Question: You were all cleaned up? Answer: Yes. Question: Had Mr. Lafky asked you to return the car to him? Answer: Yes." Now, were you asked those questions and did you make those answers on that occasion? A. Yes.

(Testimony of A. L. Brock.)

Q. And, so, at that time you were of the opinion that you weren't going to go back to work that day?

A. That's right.

Q. Does that in any way refresh your memory or recollection of this occasion?

A. If you will read some more of those questions that are there it kind of explains itself.

Q. Perhaps counsel for the plaintiff can find it. Well, I will read the entire balance of the deposition. It's only a very small affair.

A. I had—I can explain that. I had some other business to attend to. Operating the shop for myself I can quit any time I want to and so I had intended to tend to some other matters up at town but I hadn't locked the shop up at that time, no.

Q. Well, now, the fact this jury would like to know is whether you were going to go back to your shop or whether you were not going back to your shop?

A. I was going back to the shop, yes.

Q. You were? Do you recall when Mr. Engel asked you about what other business you were going to attend to—

A. Yes.

Q. —did you tell him it was none of his business?

A. Yes.

Mr. Vergeer: That's all.

The Court: Any redirect?

Mr. Gardner: No further questions.

The Court: That's all, sir, you may step down.

ROBERT H. LAFKY

produced as a witness on behalf of the plaintiff, being first duly sworn, was examined, and testified as follows:

Direct Examination

By Mr. Gardner:

Q. Your name is Robert H. Lafky?

A. Right.

Q. And, where do you live, Mr. Lafky?

A. Well, at present I have a mailing address in Salem. I am more or less a roving or traveling auditor for the State. My home is more or less wherever I hang my hat.

Q. And, what department of the State do you work for?

A. Industrial Accident Commission.

Q. And, at what time did you live in the City of Hillsboro?

A. From the 1st of October, '51, until the 1st of February, 1955.

Q. And, during that time did you know A. L. Brock?      A. I did.

Q. On the 22nd of May, '53, do you recall what type of automobile you owned?

A. 1948 Chrysler convertible.

Q. And, did you carry any liability insurance on the automobile?      A. I did.

Q. And, with whom did you carry that insurance?      A. The State Farm Mutual.

Q. Now, can you tell the jury who had possession of your car on the 22nd of May, '53?

A. From some time in the fairly early morning

(Testimony of Robert H. Lafky.)

or middle of the morning until late afternoon it was in the possession of A. L. Brock.

Q. And, when did you first learn of the accident?

A. Some time in the afternoon of that day, I couldn't give you the exact time, when he came down to the place where I was staying and told me about it.

Q. I see. And, that was Mr. Brock informed you of the accident?           A. Yes.

Q. Now, when were you first contacted by your insurance adjuster?

A. Some time within just a very few days after that, to the best of my memory. I couldn't say just whether it was one or two days or a week, I am not positive.

Q. Now, Mr. Lafky, I wonder if you could give us your best recollection of the number of times you were contacted by the State Farm adjuster from the date of the accident up until February of 1954?

Mr. Vergeer: If the Court please, I don't see how this is a relevant inquiry. I don't know exactly what counsel expects to prove. It seems immaterial at this point.

The Court: Do you wish to bring out some conversations between the parties?

Mr. Gardner: Yes, Your Honor.

The Court: You may proceed.

Mr. Gardner: Q. Can you give us your best recollection of the number of times you talked to

(Testimony of Robert H. Lafky.)

the State Farm adjuster from the date of the accident up until February of 1954?

A. It's kind of hard to remember that far back. The only one I remember very distinctly was the first time that he called me over to the office there and took down in writing all of the details of the accident, how my car happened to be out there, how Al Brock happened to have the car, how long I had known him, and all of the details about that which took, I don't know, an hour or so sitting there talking that over, and he was writing it all down. Now, after—after that time I am not positive whether there were any other times that he called me over to that office or whether I ran into him on the street and just said a few words about it.

Q. Well, let me ask you this, Mr. Lafky: Did you talk more than once to your adjuster about the accident between the date of the accident and the—or, the middle of February, '54?

A. More than once, I am sure, at least, on—at least for just a very few minutes at a time. Possibly—possibly once or twice, as I said, just happening to run into him——

Q. Yes.

A. ——and have a few words. Now, that's the best I can remember.

Q. I see. Well, as I understand it, then, you did talk to him more than on the one occasion?

A. It seems to me as though I did.

Q. And, do you have any recollection or any



(Testimony of Robert H. Lafky.)

estimate as to the number of times you did talk to him now?

A. My best recollection, I would say, probably three times altogether, a couple of them may be just for a few minutes.

Q. All right. What is your best recollection as to the period of time for which those three conversations took place or, if I can make it a little more direct, how much time elapsed between the first conversation and the last one?

A. I would say a matter of, oh, a few weeks.

Q. And, I assume that that would be some time into June or July?      A. Probably, yes.

Q. Now, on these several conversations that you had with Mr. Engel—he was the adjuster, was he?

A. Right.

Q. On these conversations with Mr. Engel did you ever discuss the question of coverage as to whether or not the State Farm would defend Mr. Brock against any lawsuit brought against Mr. Brock?

A. I can't tell you whether he came right out and flatly told me that they definitely would not defend Mr. Brock. I knew that either from just the line of questioning he was giving me or something said that very definitely he was implying to me that the reason he wanted the answers to all those questions—

Mr. Vergeer: I would object to the witness' conclusions Your Honor. If he can remember the



(Testimony of Robert H. Lafky.)

conversation I think that would be pertinent. His conclusions, I think, would be improper.

The Court: May I have the witness' answer?

(Last answer read.)

The Court: Can you give, without your impressions, necessarily, the substance of the conversations?

The Witness: The substance of it was something to the effect that there is a specific type of policy that a garage owner has to carry and this policy is just to cover you and we are—we are going to protect you, you don't have a thing to worry about. You have insurance with us but Brock does not.

Mr. Gardner: Q. And, how many occasions did he tell you that, on each of the three occasions?

A. No; just on that first time that he took all those—all that down in writing for his own report that he made those statements. And, that was—I am sure that was where I got the idea. And, then, everything in all of our conversations after that time, why, I just carried that impression in my mind all the way through that they definitely were not going to cover Al Brock.

Mr. Gardner: That's all of this witness, Your Honor.

The Court: Cross examination?

(Testimony of Robert H. Lafky.)

Cross Examination

By Mr. Vergeer:

Q. I think you said you took the car to the garage that morning?

A. (Witness nods head.)

Q. To be worked on?           A. Yes.

Q. And, that thereafter Mr. Brock came and told you about the accident?

A. That's right.

Q. That was the afternoon some time?

A. Some time in the afternoon.

Q. Do you know whether Mr. Brock had seen his attorney before he came to see you?

A. I would have no way of knowing.

Q. Yes. He didn't tell you that he had, did he?

A. No.

Q. What did Mr. Brock tell you at that time when you had that conversation with him?

A. When he first came in and told me about the accident?

Q. Yes?

A. He just came in and I could see he was pretty well shaken up and he called me outside—I was standing there talking to three or four other men—and he called me outside and then he told me that he had banged up the car.

Q. Did he tell you what he was doing at the time?

A. No, sir; I can't remember that he told me exactly what he was doing.

(Testimony of Robert H. Lafky.)

Q. Did he tell you that he was testing it at the time?

A. No, he never did flatly tell me that he was testing the car. I know that somehow I got the idea, possibly, on an assumption of my own that he was ready to return the car to me at the time either that he was on the way to return it to me or that that was what he was doing. I don't believe he actually told me that.

Q. But, it was your impression after your conversation with him that that is what he had been doing?

A. That was just my impression, yes.

Mr. Vergeer: I wonder if the Bailiff would hand Plaintiff's Exhibit Number 8 to the witness, please?

(Whereupon the Bailiff did as requested.)

Mr. Vergeer: Q. Will you tell the jury what that Plaintiff's Exhibit Number 8 is?

A. Personal injury report. A report that I filled out in the insurance—in the State Farm Insurance office.

Q. And, you signed that report, did you?

A. Yes.

Q. And, that was your report to the company as to what occurred?

A. Well, someone else did all the writing, I didn't. They probably—in the office I imagine I was standing there talking to them and gave them the details and probably the insurance agent did all the writing himself.

(Testimony of Robert H. Lafky.)

Q. And, after he did the writing you were able to see what he wrote?

A. I suppose I probably watched him.

Q. You watched him write it? A. Yes.

Q. And, then, you signed it, is that right?

A. Well, I imagine. It looks very similar to my signature. I imagine I was so shaken up at the time I was pretty well nervous and everything over the accident that the signature isn't too good.

Q. But, actually, you recall signing the accident report, don't you?

A. I remember I filled out some kind of a report so I must have signed it.

Q. You think that that is your signature on there? A. Yes, it must be.

Q. And, all the writing was on the document before you signed it, isn't that right?

A. Yes.

Mr. Vergeer: We will offer Plaintiff's Exhibit Number 8, Your Honor.

Mr. Gardner: If it please the Court, I would object to the introduction to this on the grounds that there is no basis laid for it. I can't see that it's relevant to the witness' testimony and I don't know whether they are claiming it for impeachment purposes or not.

Mr. Vergeer: If the Court will examine the document it relates to the conversation and has a bearing upon the conversation between Mr. Brock, the garage man, and Mr. Lafky, and he has testi-

(Testimony of Robert H. Lafky.)

fied concerning that conversation and this is further evidence on what the conversation was.

The Court: It will be received.

(Whereupon Defendant's Exhibit 7, an accident report, was received in evidence.)

Mr. Vergeer: Q. Now, Mr. Lafky, I believe on your direct examination—

May I, Your Honor, read that exhibit to the jury at a later time or should I read it to the jury now?

The exhibit is a form printed by the State Farm Mutual Automobile Insurance Company stating "Automobile Claim Report. Western Office." The policyholder's name is "Robert H. Lafky." The policy number is given, his address is "818 Oak Street, Hillsboro, Oregon." The date is "9-28-53 Time and Place of Accident Date May 22, 1953. Time: 3:00 o'clock p.m. City of Hillsboro County of Washington State of Oregon." A description of the policyholder's car follows. Then, there is filled in "Description of damage: front end and side damage." Then, there is described the accident or loss in detail and after that it says, "I had taken my car to the garage for motor work—in testing car, garage owner wrecked it." There is nothing else filled in on that side. Under Personal Injury Report Space there is filled in a question mark "C Driver Age: ? Address: ? Description of Injuries: knee injury." It is then dated 22 May, 1953, Robert H. Lafky.



(Testimony of Robert H. Lafky.)

Q. Mr. Lafky, you and Mr. Brock, the garage owner, were good personal friends, weren't you?

A. Right.

Q. Now, with respect to your conversation with Mr. Engel at a later date did Mr. Engel ever tell you that he would not cover Mr. Brock or that he would not defend him in case he was sued?

A. Whether he flatly stated he wouldn't defend him in case—in case the company was called to—called upon to do it in case it came to court I know that he said that Brock had no insurance with that company and that they would protect me and just me.

Q. Now, do you recall when your deposition was taken on January 29th of this year, you were present, the Reporter was John Beckwith, and there was present Mr. James Gardner who is seated next to me and myself and yourself. It was taken in the Public Service Building. Do you recall at that time being asked this question "Q. Do you recall whether or not you had a conversation with Mr. Engel in which he informed you that if you were sued your company would defend but as long as the suit was just against Brock the insurance company figured there was no coverage and they would not defend that?" And your answer "I can't remember him making that statement as being a definite fact. As best I can remember somebody somewhere along the line gave me the impression and I couldn't say whether Mr. Engel or Mr. Hines or someone else gave me the impression that Mr.



(Testimony of Robert H. Lafky.)

Brock was supposed to have some kind of mechanic's policy to cover him if he was working on the car and operating it just strictly as a mechanic. But, I can't remember Mr. Engel telling me definitely that they would not defend him, no, not making a statement like that." Is that what you said?

A. I don't deny that that's what I said at that time and——

Q. And, at this time——

Mr. Cosgrave: I think the witness was answering further when he was interrupted.

The Court: Yes. I think he was making an explanation.

Mr. Vergeer: All right.

The Court: You may continue.

The Witness: As I have been trying to say here already in the different—the number of different times that I have been questioned about it by various people it has been sometimes hard for me to remember just exactly who made what statement or where I got the idea. Now, that was undoubtedly why I said that there at that time.

Mr. Vergeer: Q. Again, turning to page 21, "Question: Do you recall whether or not you talked to Mr. Engel and he told you that your company would defend you but that they would not defend Brock? Answer: As I stated before I don't recall that he said anything like that as a flat statement." Now, is that——

A. As a flat statement coming out and saying that they definitely would not defend Brock but

(Testimony of Robert H. Lafky.)

telling me that I was the one that had insurance with their company and that Brock did not——

Q. That Brock did not, you mean, that it was not Brock's policy?      A. That's right.

Mr. Cosgrave: Well, I will object to that as argumentative, Your Honor.

The Court: I will leave it in the record.

Mr. Vergeer: Q. But, Mr. Engel at all times told you and as far as you were concerned that the company would in any event take care of you because you were its insured?

A. That's right. They told me that they would fully protect me.

Q. There was no question about that at any time, was there?      A. No.

Mr. Vergeer: I think that's all.

The Court: Redirect?

Mr. Gardner: I have a few questions, Your Honor.

#### Redirect Examination

By Mr. Gardner:

Q. Mr. Lafky, do you recall whether or not your deposition was taken January 29, '55, and the one that Mr. Vergeer has referred to?

A. I believe so if that's the date.

Q. Could you tell the jury where it was taken?

A. It was here in Portland.

Q. Do you recall whether or not it was at the office of Holbrook and Cronan in the Public Service Building or—I think it's Schafer, Holbrook and Cronan?

(Testimony of Robert H. Lafky.)

A. The names I wouldn't swear to. I don't know them. I am not familiar with them. But it does seem to me as though it was in the Public Service Building.

Q. Now, do you recall whether or not that you had been asked to come and have your deposition taken by the attorney for Mr. Oslund?

A. I can't remember even who it was that asked me to come in and have the deposition taken.

Q. Do you recall whether or not a subpoena was served on you to be there for the purpose of having the deposition taken?

A. As best I can remember there was no subpoena served; that I was just either telephoned and requested to come in—

Q. Do you recall whether or not the deposition was set for 10:00 a.m. on Saturday morning, January 29, '55?

A. No, I don't recall exactly.

Q. Do you recall whether or not the State Farm after you had been notified of the deposition sent a representative to you to contact Mr. Vergeer prior to the deposition that morning?

A. To the best of my recollection they did.

Q. Do you recall whether or not you did contact Mr. Vergeer that morning prior to the deposition?

A. I did.

Q. And, where did you contact him?

A. At his office.

Q. Do you recall whether or not you had coffee with him?

A. I believe I did, yes.

(Testimony of Robert H. Lafky.)

Q. And, do you recall whether or not you discussed with him what the taking of the deposition was?

A. It seems to me he just more or less explained to me generally.

Q. Well, would you explain to the jury?

A. What the deposition was and tried to relieve my mind as far as being kind of nervous over it or worried about it.

Q. Now, explain to the jury how he explained this to you?

A. I can't really explain it any more than that he just said it was something that I didn't have anything to worry about, it was something that was needed in the process of the litigation that was arising or that was coming up and that—I don't believe he went into it in any more detail than that.

Q. Yes. Well now, Mr. Lafky, do you recall that the deposition after you answered the questions that were just asked you, the same questions Mr. Vergeer has now asked you or read from, and then after he read from those answers do you recall the next question that was asked you at the deposition?

Mr. Vergeer: What page?

Mr. Gardner: Page 25.

“Now, did you have any discussion in his office this morning as to what your obligations and duties were under this policy you have? Answer: No discussion about my duties and obligations, nothing more than a deposition was going to be taken and he was to defend me or to be here with me the



(Testimony of Robert H. Lafky.)

same as in a trial and that a deposition—I asked him what it was like, I had never taken one before, so they told me it was very similar to giving testimony in any trial and that they would have a right to object to part of it or not to answer certain parts of it if he deemed advisable. That was just explained to me what a deposition was like, that was all. Question: What was that about he would defend you the same as” blank “I didn’t understand that? Answer: Well, it was that it was necessary for me to be defendant, if I needed an attorney as far as my car was the car that was involved in the automobile accident and I was carrying my insurance with the company. Question: You understand, Mr. Lafky, that this is a suit against the insurance company and irrespective of how this suit comes out it could not possibly involve you? Answer: No, I haven’t understood that all the way along. I have had no way of knowing whether I was subject to lawsuit personally or not. I have had no way of knowing.” Do you recall those questions and answers being asked?

A. Yes, I recall them.

Q. And, did that happen?

A. Yes, I recall all that.

Mr. Gardner: I wonder if I could have the exhibits here, please? Your Honor, would it be possible for me to approach the witness to ask questions of different points on the exhibit?

The Court: Do you have a copy of it before you?

(Testimony of Robert H. Lafky.)

Mr. Gardner: Yes, Your Honor.

The Court: Can't you use the copy?

Mr. Gardner: Yes, Your Honor.

Q. Now, Mr. Lafky, will you turn to page 1 of this exhibit and so that the record is clear would you read the number of the exhibit if you can find it on it?

A. Exhibit Number 7. It's been changed to here, I believe.

Q. Now, would you turn to the page that you signed? Does that have the date of the 22nd of May, 1955? A. 1953.

Q. Excuse me. '53. Was that the date of the accident that you made the report?

A. It seems to me like it was.

Q. Now, do you remember what time of day it was that you went over to make the report?

A. As best I can remember some time the middle of the afternoon after Al Brock got down there and notified me of the accident and then I went over to the Sheriff's office first, I believe, and filed my accident report there then it seems to me as though I went straight across the street from the Sheriff's office to the State Farm Mutual Insurance office and filed this report there.

Q. Now, Mr. Lafky, about what time was it on the day of the accident that Mr. Brock contacted you?

A. It seems like it was, oh, it may have been anywhere from 3:30, 4:00 o'clock.



(Testimony of Robert H. Lafky.)

Q. And, what time was it that you went to the insurance company's office?

A. It seems to me like it was just barely before closing time; just barely before 5:00.

Q. Well, about how much time did you discuss this accident with Mr. Brock?

A. With Mr. Brock probably just a few minutes.

Q. Well, now, when you were discussing the accident with Mr. Brock this few minutes before you made your report were you at all concerned what Mr. Brock was doing at the time of the accident? Did it make any difference to you?

A. No, it didn't make a bit of difference to me what he was doing.

Q. Do you recall whether or not you specifically asked Mr. Brock at that time, "Were you testing the car when this happened"?

A. No, I definitely did not ask him any such question.

Q. Did you even care whether he was testing the car or not?      A. I did not.

Q. Now, when you went over to the insurance company's office you say that that was directly after you talked to Brock?      A. Right.

Q. And, that the only discussion—and that you only talked to him for just a few minutes?

A. Right.

Q. Will you turn to this same page that your signature is on, number 1, where it says "Mr. Miss. Mrs." And, then it says "? C Driver. Age: ?. Address: ?." Is that your writing?      A. No.

(Testimony of Robert H. Lafky.)

Q. Where it says "Description of Injury: knee injury." Was that your writing?

A. No.

Q. Was Mr. Brock with you at the time you made the report?

A. That I made this report in the insurance company office?

Q. Right.

A. It doesn't seem to me as though he was.

Q. Now, who filled in the other portion of it where it says on the next page "Time and Place of Accident: City: Car:" and so on?

A. It would—it's definitely not my handwriting. I would—my best guess would be that it was either Al Hines the insurance agent or his wife who worked there in the office that I gave one of them the information, stood there at the desk—at the counter talking to them and they wrote it down.

Q. All right. Now, Mr. Lafky, referring to the page of this report where it says, "Policyholder. Robert H. Lafky. Policy Number: 241845-C28-37" then referring to the back page where it says, "C Driver. knee injury" and then referring to the bottom where it says, "Insured must sign here: Robert H. Lafky" did the same person write all three of those?

A. No, I would say it's written by three different people.

Mr. Gardner: That's all, Your Honor.

(Testimony of Robert H. Lafky.)

Recross Examination

By Mr. Vergeer:

Q. And, all of it was written, however, while you were in the office and before you signed it and in your presence, isn't that right?

A. I imagine the—I sure can't remember anything about this "C Driver" and "knee injury." Can't remember what that was all about.

Q. Yes?

A. But, I imagine it—I wouldn't know whether I could have been standing there and they filled out this front side and then just turned it over and said "Sign here" and I signed it and then this be filled in later, I would have no way of knowing.

Q. You have some doubt, then, as to the matter of whether "C Driver. knee injury" was on there when you signed it but you have no doubt about the rest of it, do you?

A. I wouldn't vouch for it because I don't remember.

Q. Well, now, I am not referring now to this "C Driver, knee injury" let's leave that out.

A. Just the front page.

Q. The rest of that was filled in in your presence at the time, wasn't it?           A. Yes.

Mr. Vergeer: All right. That's all.

Mr. Gardner: No further questions of this witness, Your Honor.

The Court: Would you hand the exhibit to the Clerk, please, Mr. Lafky?

(Whereupon Mr. Lafky did as instructed by the Court.)

The Court: You may step down.

(Witness excused.)

### Instructions

The Court: Members of the jury, the trial of this cause has now reached the point where it becomes the duty and the obligation of the Court to instruct and advise you concerning the law which is applicable to the matters at hand and which shall guide you throughout your entire deliberations upon your verdict.

Now, bear in mind, ladies and gentlemen of the jury, that your sworn duty in this case is, by your verdict, to find a true and a just determination of the cause and all issues of fact based upon the evidence produced here in open court subject to the instructions of law as shall be given to you by the Court.

Now, the Court does have the right to advise with you concerning the evidence; however, the Court has no right in any degree to influence you in determining your ultimate verdict and you are assured that it has no right to do so. Therefore, if during the course of the trial or these instructions you have gained some impression as to how you think the Court might feel with reference to any fact in controversy you must disabuse your mind of that feeling for that is your right. On the other hand the Court is here for the purpose of giving you the law and you shall accept the law as

given to you by the Court and not substitute therefor what you think the law is or what you think the law should be.

Now, the statements and the arguments of counsel are not evidence in the cause nor are they to be taken by you as the law in the matter but you should consider the arguments of counsel and their evaluation of the evidence as they see it for the purpose of helping you to arrive at a true and a just verdict.

Now, the claimant in this cause is H. R. Oslund, and the Court will refer to that party throughout these instructions as the plaintiff. And, the defendant is the State Farm Mutual Automobile Insurance Company, and the Court shall refer to that party as the defendant. Now, bear in mind, members of the jury, that an individual such as the plaintiff in this cause is bound by his own acts and doings just the same as you and I. On the other hand, a corporation necessarily must act and operate through its management and through its servants and its agents and the law provides that the acts and the doings of any agent of a corporation is to be taken as the act and the deed of that corporation as long as that agent or servant had authority from the corporation or apparent authority from the corporation to so act on behalf of the corporation.

Now, ordinarily, the authority of an agent can only be determined in what instructions or what directions the corporation gives to the agent and if they had written instructions that ordinarily



would be binding, but as in this case any authority on the part of the adjuster, Mr. Engel, we must arrive at and determine from the facts and doings of himself and the corporation in relation thereto. In other words, it is a question of fact arising from all of the facts and the circumstances of their conduct with reference to each other and third parties in determining actually what authority that agent had or what apparent authority he had from such facts and circumstances as you have before you and you may infer authority from such acts and conducts as are accepted and ratified by the corporation.

Basically speaking, members of the jury, this is what would be called an action in contract and the rights of the plaintiff in this cause arise solely from the contract in question and the obligations and the responsibilities of the defendant to the plaintiff arise only from the terms of that contract; they can be no less and they can be no greater. Therefore, under the facts and the law of this case we look solely to the contract of insurance as determining the rights of the plaintiff, if any, and determining the obligations, if any, of the defendant to the plaintiff. We have that before us but under the law and the facts of this case the issues boil down to relatively two simple questions. It is conceded that the contract of insurance was in force. It is also conceded that the automobile being driven by Mr. Brock was being driven with the consent under the terms of the policy of the name insured, Mr. Lafky. But, the differences between the two

parties arise by reason of the defendant's claim that Mr. Brock in connection with the litigation of this plaintiff against Mr. Brock failed to comply with the terms of the policy which provided in effect that all demands on the part of this plaintiff made against Mr. Brock and all Summons or Complaint or process issued in any court arising out of litigation by this plaintiff against Mr. Brock in the State Court referred to should have been timely sent to the defendant.

Now, ordinarily speaking the defendant is entitled to have that provision of the contract complied with before its liability, if any, occurs under the contract. Now, it is conceded in this cause that the so-called copies or the original of the Summons and Complaint and the demands were not forwarded to the defendant company and in this respect the Court said it was the obligation of Brock to comply with this provision if he wished the insurance company to accept its liability thereunder unless it can be found that he was excused from doing so by the acts and the conduct of the defendant. And, in this regard you are instructed that the plaintiff contends that the defendant through its alleged agent denied obligation or liability to Mr. A. L. Brock and that therefore he was excused in so doing. In determining whether or not the insurance company did deny coverage to Mr. Brock it is not enough for you to find that a question of fact admittedly existed between Mr. Brink who was the attorney for Mr. Brock and Mr. Engel the adjuster. As to the use which was being made of the Chrys-

ler automobile at the time of the accident, the mere statement of opinion on the part of the representative of the insurance company is not enough to justify a finding that the company refused coverage. Unless coverage or liability was definitely denied to Mr. Brock by the insurance company at the time prior to the filing of the action by Mr. Oslund your verdict in the case must be for the defendant. If on the other hand, you find from a preponderance of all of the evidence in the case that the defendant did, acting through its agent, Mr. Engel, definitely deny any liability under the policy to Mr. A. L. Brock during the time of the discussions referred to in the evidence then you should consider the second phase of this case, the second phase being the second question which is raised by the contention of these parties, namely, was the automobile being operated in the course of the operation and management of a garage business.

Now, under the terms of the policy it is provided that the insurance company should not be liable in the event that any accident involving the car mentioned in the policy arose out of its operation in the course of the operation of a garage building. The defendant contends that that was the case. The plaintiff contends that under the facts of the case the car was being driven for the personal use of Mr. Brock and in this connection then it must be necessary for you to determine whether or not this denial—now, members of the jury, I wish to go back in connection with the denial of the liability claim. The Court referred to that. It would

be your obligation then to go on and consider a second phase of the case and I started to discuss with you the condition of the policy or the exclusion of the policy with reference to the car being or not being operated in the course of the garage building. I misspoke myself. There is one phase that I think you must consider before we go into that piece of discussion in an orderly fashion. The Court having already instructed you that if you did find from a preponderance of the evidence that the company through its agent did deny liability, then it would be necessary for you to go to the second phase of that question or the contention of the plaintiff merely that by the acts and doings of the defendant it waived the provision of the policy that it should receive notices and copies of the Summons and Complaint. And, in that regard if you find that the defendant after having actual knowledge of the nature of the claim of this plaintiff against Brock denied that its policy of insurance covered A. L. Brock on the ground that the accident arose out of the operation of the garage then such a denial is, under the law, a waiver of any policy requirements as to the furnishing of the defendant with notice of suit, copies or the original of Summons and Complaint, and in that event you cannot consider as a defense any lack of delivery of such notices, Summons, or Complaint and you must find in favor of the plaintiff in connection with its claim, that is, claim that the company waived that provision of the policy called to your attention.



Now, turning our attention to the second issue of the cause, namely, whether or not the automobile at the time of the accident was being driven in the course of the operation of an automobile repair business, you are instructed that the defendant is claiming as a defense that the accident on May 22, 1953, arose out of the operation of a garage business. You are instructed that the defense just referred to is based upon an exclusion in the insurance policy of the defendant and in this connection you are instructed that with respect to the use of any automobile in that regard there is no precise definition of the phrase "arising out of the operation of an automobile repair shop" or a public garage possible. It is a question of fact for you to determine under all of the facts and circumstances of any particular use. The mere fact that some phase of the garage operation might possibly have been connected with the use of the Lafky automobile, that alone does not warrant a finding by you that the action of the operation of the automobile was in the course of the operation of a garage. However, if you find that A. L. Brock at the time of the accident was driving the automobile in question on a personal errand not naturally or necessarily connected with the operation of his garage business then you are instructed that the operation of the automobile and the accident resulting did not arise out of the operation of a garage business nor was the automobile being used in such an operation, and this defense claimed by the defendant would not be available to it. And, having reached that stage of



your consideration your verdict should be for the plaintiff. If, however, you find from a preponderance of all of the evidence in the case that Brock's purpose in driving the car at the time of the accident was for the purpose of making a road test following the repair or adjustment of the car in the course of his garage business or in any incidental use in connection with making such a road test that would necessarily be a part of the operation of his garage business then you are instructed that it would be your duty to return into Court a verdict for the defendant.

Members of the jury, the proof in all cases rests upon the party having the burden of proof in the case. Now, of these two issues we have been discussing; namely, first, whether or not the defendant through its act and conduct in connection with denying liability, if you find from a preponderance of the evidence that it did deny liability and as a result thereof waived its provisions of the policy that required that all notices and demands, summonses, complaints, and processes served upon Mr. Brock be delivered to them would be upon the plaintiff and it would be the duty and obligation and the plaintiff would have the burden of proving to you by a preponderance of all of the satisfactory evidence in the case that the defendant did so waive the provision referred to in accordance with the terms of these instructions. Now, on the other hand, as to the question of whether or not the automobile being driven by Mr. Brock at the time of the accident was then being driven in the course of the

operation of his garage business, it rests upon the defendant and defendant has the burden of proving to you by a preponderance of all of the evidence in the case that the car at the time of the accident was being so driven in the ordinary course of the business of Mr. Brock's automobile repair shop, and ordinarily the party has the burden of proof to prove his case or his side of the case by a preponderance of the evidence. To inquire as to what we mean by a preponderance of the evidence, by that term we mean the greater weight of the evidence or that quantum of evidence when fully and fairly considered and weighed produces upon a reasonable and an impartial mind the stronger impression and is more convincing of its truth than the evidence in opposition thereto. In other words, the party having the burden of proof in any particular phase must make out the better and the most reasonable case in that regard in light of all of the evidence in the case.

Bear in mind, members of jury, that throughout your entire deliberations of the phases and facts and issues that have been submitted to you by way of determining the liability or the non-liability of defendant in this case you must not be influenced in any degree or any manner by sympathy or prejudice and you must base your ultimate verdict upon a calm and a conscientious and orderly and judicious consideration of all of the facts in the case subject to these instructions.

The Court will submit to you in addition to the general verdict form that the Court will call your

attention to later on a so-called special interrogatory or a special finding and the finding of this question you are required to answer and will be answered by a yes or no answer. Whenever you have arrived at your answer to this question you will cause your foreman to write in and fill in your yes or no answer and sign that special finding in the same manner that your foreman will sign a general verdict as I shall hereafter discuss with you.

In connection with this question it reads simply as follows: "Was A. L. Brock, at the time of the accident, using Mr. Robert Lafky's automobile in the course of his business as a garage mechanic:" spaces for your yes or no answer and a signature line for your foreman. If you find that Mr. Brock's purpose in taking the car on this trip was to test it with respect to its mechanical operation then your answer to the special question should be yes. On the other hand if you find that Mr. Brock's purpose in taking the Lafky car on the trip in question was simply to have transportation for an errand of a nature personal to him and not necessarily connected with his business as the operator of a garage then your answer to this special question should be no.

Members of the jury, under the law it becomes necessary for the Court and counsel to confer before submitting the matter finally to you for determination. Will you please excuse us and make yourselves comfortable in the jury room until you are called?

(Whereupon the jury was excused and the following proceedings were held out of the presence of the jury.)

The Court: Now, I will advise counsel that I will give a few cautionary instructions such as what you might call statutory as well as the defendant's requested instructions about——

Mr. Vergeer: It's my understanding the Court is still going to do that?

The Court: I wanted to wind up any corrections I want to make. Plaintiff's exceptions?

Mr. Cosgrave: Your Honor, the plaintiff will except to the Court's giving of the Defendant's Requested Instruction which begins "In determining whether the insurance company denied coverage to Mr. Brock, it is not enough for you to find that a question of fact admittedly," and so forth——

The Court: Yes.

Mr. Cosgrave: ——on the grounds and for the reason that the instruction is argumentative and on the further ground that it does not correctly state the law in that the word "denied" is preceded by the word "definitely" and that the law clearly with respect to waiver is that it may be even from conduct. The word "definitely" makes the instruction argumentative and imposes a burden of proof upon the plaintiff it should not have to sustain.

I would further—well, that would be the only exception to the instructions, Your Honor.

The Court: You may have your exception.

Mr. Vergeer: If the Court please, we will ask for an exception to the failure of the Court to—I



believe the Court did not give the one instruction the Court informed us in advance that he wouldn't give which begins "One of the issues raised by plaintiffs in this cause \* \* \*"

The Court: Yes.

Mr. Vergeer: The Court did not give that instruction and I would like an exception to that. Then, I would like an exception to the Court's giving of the Plaintiff's Requested Instruction Number 7 which reads "The mere fact that some phase of the garage operation might have been connected with the use of the Lafky automobile by Mr. Brock does not alone warrant a finding by you that the action arose out of the operation of a garage" but "If you find that A. L. Brock, at the time of the accident, was driving the automobile in question on a personal errand not naturally and necessarily connected with the operation of the garage, then the accident did not arise out of the operation of a garage and this defense would not be available to the defendant" on the theory, Your Honor, that that is the question presented to the jury and while it might not naturally or necessarily be connected with the operation of the garage if, in fact, it was connected with the operation of the garage and arose out of the operation of the garage would nevertheless be a defense to us. That is the only other.

The Court: You may have your exception.

Mr. Cosgrave: I will ask a further. Did I understand originally that exceptions were allowed to the failure to give requested instructions, Your Honor,



or did you want us to take exceptions to the failure to give any requested instruction?

The Court: Well, if you want to rely on your record you had better take an exception.

Mr. Cosgrave: All right. The plaintiff would except to the Court's failure to give Plaintiff's Requested Instruction Number 1; the failure to give Plaintiff's Requested Instruction Number 9, Number 13, particularly in view of the Court's using the word "definitely"; and Instruction Number 14 with respect to estoppel.

The Court: I think I used the word in connection with discussion.

Mr. Cosgrave: I beg your pardon.

The Court: I think I used the word in connection with discussion.

Mr. Cosgrave: You mean the word "definitely," Your Honor?

The Court: No. What I had in mind, I struck the "It is not necessary that a denial of coverage be in writing, any oral statement or acts by the insurance company denying liability under its policy would be sufficient." And it occurred to me that by you saying that by the use of "definitely" that that would mean that it would have to be in writing—

Mr. Cosgrave: Yes, I think it would.

The Court: —well, I don't think to the jury that would mean it would have to be in writing.

Mr. Vergeer: Your Honor, there is nothing in this case which has anything to do with anything being in writing.

The Court: I understand.

Mr. Vergeer: Injecting such a thought into the mind of a jury would probably be the problem.

The Court: You may have your exceptions.

Mr. Cosgrave: Thank you, Your Honor.

The Court: Will you please call the jury?

(Whereupon the jury was seated and the following proceedings were held in the presence of the jury:)

The Court: Members of the jury, every witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which the witness testifies, by the character of his testimony, and by evidence affecting his character or motives or by contradictory evidence. And also you may take into consideration in determining what credibility you desire to give to the testimony of any witness, the particular interest in the outcome of the cause such witness may have as appears from the evidence. You are the exclusive judges of the credibility of the witnesses and of the effect and value of the evidence and of every question of fact in the cause but your power of judging the credibility of witnesses and the effect in value of the evidence is not arbitrary and must be exercised by you with legal discretion in subordination to the rules of evidence as determined by the Court. You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds as against a lesser number or as against a presumption or other evidence that bind your minds.

If in the course of the trial any witness has testi-

fied falsely in any particular of his testimony you should consider the rest of such witness' testimony with caution. And if you further find that any witness has willfully testified falsely in any particular then you are entitled to disregard the testimony of such witness altogether.

Evidence is to be estimated not only by its own intrinsic weight but also according to the evidence which is in the power of one side to produce and of the other to contradict. Therefore, if weaker or less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party the evidence offered should be viewed by you with distrust.

Now, members of the jury, when you retire to the jury room you should elect from one of your number a foreman who should act as your chairman throughout your entire deliberations. You will be supplied with two forms of verdict, a general verdict together with this special question that the Court advised you about. The first form of verdict appearing in my hand reads as follows: "We the jury duly impaneled and sworn to try the above-entitled cause find our verdict in favor of the plaintiff and against the defendant and assess the amount to be recovered in the sum of \$10,000 together with interest thereon at the rate of 6 per cent per annum from February 27, 1954. Dated September 28, 1955." Signature line for the foreman. The second form of verdict that I have in my hand reads: "We the jury duly impaneled and sworn to try the above-entitled cause find our verdict in

favor of the defendant and against the plaintiff dated this blank day of September, 1955." A signature line for the foreman. If your verdict in this cause be for the defendant cause your foreman to sign the same and return it into Court. Again, the question asked to you in the special interrogatory reads: "Was A. L. Brock at the time of the accident using Mr. Lafky's automobile in the course of his business as a garage mechanic?" Spaces for yes and no answer. Cause your foreman to fill in such answer as you shall find, sign the verdict, and return it into Court.

Will you charge the Bailiff?

(Bailiff charged.)

The Court: You may retire in the custody of the Bailiff.

(Whereupon the jury retired for deliberation.)

[Endorsed]: Filed Nov. 21, 1955.

[Title of District Court and Cause.]

PARTIAL TRANSCRIPT OF PROCEEDINGS,  
TESTIMONY OF MERVIN W. BRINK, ED-  
WARD I. ENGEL, AND RALPH THOMI-  
SON

Portland Oregon, Sept. 27, 28, 1955

Before: Honorable William G. East, District  
Judge.

\* \* \* \* \*

Mr. Gardner: I would like to call Mervin W.  
Brink.

MERVIN W. BRINK

produced as a witness on behalf of the plaintiff,  
being first duly sworn by the Clerk, was examined  
and testified as follows:

Direct Examination

By Mr. Cosgrave:

Q. You are Mervin W. Brink?

A. That's correct.

Q. And, will you tell the jury what your oc-  
cupation is? A. I am an attorney.

Q. And, where do you practice law?

A. In Hillsboro.

Q. What is the name of the law firm?

A. Schwenn and Brink.

Q. How long have you practiced there, Mr.  
Brink? A. Since 1942.

Q. Are you married? A. I am.

Q. Do you have any children? A. Six.



(Testimony of Mervin W. Brink.)

Q. Are you connected with Mr. Gardner in your practice? I mean, are you associates or partners out there in any way?

A. No. We are strictly adversaries.

Q. So, there is no connection between your offices? A. Not at all.

Q. All right. Have you at times in the past represented Mr. Brock who just testified?

A. I represented Mr. Brock since—well, I don't remember just when—yes, I have since before this accident happened with Mr. Oslund, however.

Q. You had represented him on other matters before the accident?

A. I had represented him, as I recall, on a couple of minor matters prior to that time.

Q. And, did Mr. Brock consult you with reference to this accident that he had on May 22, 1953?

A. Yes, he did.

Q. And, do you recall about when it was that he first came to see you?

A. Well, I checked my records last night. We keep a file in the office of people that come in. And, it was the latter part of May.

Q. I see. Do you remember whether after that time you had any conversation with Mr. Edward Engel who sits—

A. Yes, I see him back there.

Q. —or was sitting in the courtroom? And, do you know what his occupation is?

A. He was and I assume still is an adjuster for the State Farm Mutual.

(Testimony of Mervin W. Brink.)

Q. All right. And, when you first talked to him what was the nature of your conversation?

A. Are you talking about this accident?

Q. Yes, with respect to this accident?

A. Mr. Engel was in our office on another matter, as I recall it. The first time I discussed it with him he was in my partner's office which is closer to the door than mine and I was engaged with another client and as I stepped to the door Mr. Engel was in the doorway of Mr. Schwenn's office, he had been talking with him preparatory to leaving so I then talked—or, he talked to me about this, mentioned this accident, and then I discussed it with him at that time.

Q. And, what conversation did you have with him with respect to any insurance of the State Farm Mutual Insurance Company?

A. Well, I can't remember the exact words. I have talked with Mr. Engel many many times about various cases over a period of years but the gist of the conversation, as I recall it, was that I kiddingly or jokingly told him that this was one the State Farm was stuck on and he told me that, no, they had a policy exclusion on this case and they were not interested in it.

Q. Did he state to you that their policy did not cover Brock for this accident?

A. In so many words. I can't say that that was his exact language.

Q. The conversation as you have given it here to us previously?           A. Yes.

(Testimony of Mervin W. Brink.)

Q. All right.

A. He said simply that they were not—that they weren't concerned about the case and they weren't on it because they had a policy exclusion. Now, that's the first time.

Q. Did he mention the policy exclusion that they had?

A. Yes, he did.

Q. And, what was it?

A. It was the garage operator's exclusion.

Q. All right.

A. As a matter of fact, we—well, not at that time but a later date we did discuss it further.

Q. All right. Did you have a further conversation with him then about this accident?

A. Well, I talked to him several times about it over the course of the summer and the next spring. I don't think he ever specifically came in to see me about this accident. But, when we were talking about other cases we would discuss it from time to time.

Q. And, did you discuss with him on those occasions the fact that a suit was pending?

A. Well, I think the second or third time that he had come into my office and this case came up in a conversation we discussed the policy exclusion and he didn't have with him a State Farm policy nor did I have one in the office but I got out my own liability policy and we were examining or, rather, I examined the policy and got it out and looked at the garage owner's exclusion on standard form policy and Mr. Engel recited to me, as I re-

(Testimony of Mervin W. Brink.)

call, the conversation that that was substantially the same form that they had in theirs. And, at the time I asked him if they were still standing on their exclusion and he said they were.

Q. And, did you at that time tell him that you were defending Mr. Brock in the Circuit Court?

A. Well, he knew that. He knew that.

Q. He knew that you were defending?

A. Yes.

Q. You had discussed the pendency of that case?

A. Oh, yes. There wasn't any question about that at all.

A. And, did he on other occasions ask you, inquire about the status of the case on the occasion when he was in there on other purposes?

A. Well, he mentioned it casually from time to time, yes. I believe that I discussed with Ed the second or third time we talked about it or maybe even the first time the fact that the Girard was also on it—was also the other carrier and I felt that they were primarily liable on the thing.

Q. I will ask you this: Mr. Brink, is it normally your practice to forward the Summons and Complaint to the insurance company involved?

A. It would be but in this case there were two companies, first of all, and there was only one copy of the Summons and Complaint and I had no photo re-processor in the office. We do now but we didn't at that time. I thought that Girard was the primary carrier and I told Cal, the agent who had written the policy and whom Mr. Brock had notified and



(Testimony of Mervin W. Brink.)

whom he had notified, that he had been sued and they had disclaimed any liability. So, I wrote them a letter and Mr. Engel had said that his company wasn't interested in it because they had a policy exclusion and I told him in my opinion they were but there wasn't any use in forwarding them.

Q. All right. Well, that was my question. If he had not made the statements to you that he had would you have forwarded the Summons and Complaint to them?

A. I would have called Mr. Vergeer and told him I had a Summons and Complaint and asked him if he wanted it.

Q. Yes?

A. But, here is the difference—I mean, to explain why I didn't do this—I don't want you to feel that I let the client down—the Girard agent was a local agent who writes the policy. He is not an adjuster or, in my opinion, an authorized agent to whom a Summons and Complaint would be forwarded. On the other hand, Mr. Engel is an agent and he is an adjuster. He comes out and writes checks, gives releases, and takes them, and does all the other business for the company in that area. Now, that's the reason I didn't go any further than that when Mr. Engel disclaimed any liability.

Q. You felt that was the word of the company?

A. That's right.

Mr. Cosgrave: All right. No further questions.



(Testimony of Mervin W. Brink.)

Cross Examination

By Mr. Vergeer:

Q. Actually, Mr. Brink, you know that Mr. Engel has no authority to admit or deny coverage, don't you?

A. Well, Mr. Vergeer, I don't know the extent of Mr. Engel's authority. I do know what he has told me so far as his authority is concerned. I know that in some instances he does not have sufficient authority to settle certain lawsuits either because of the amount involved or other factors. On others he does. But——

Q. The question, then, is open in your mind as to whether he has authority to deny coverage for the company or otherwise?

A. I think not, not in my mind. When an adjuster comes out to you and he says we are denying liability any lawyer who handles a lot of personal injury cases or many personal injury cases, even your office, I would assume, would accept that as the word of the company.

Q. Now, let me ask you whether the Girard, that is the employer's group who had the policy on the Brock car, they refused liability—they refused coverage, didn't they?

A. They refused coverage through their agent who wrote the policy in Hillsboro.

Mr. Cosgrave: What the Girard people would do would have no bearing on this case.

The Court: Are you objecting to it?

Mr. Cosgrave: Yes.

(Testimony of Mervin W. Brink.)

The Court: What do you claim for it, Mr. Vergeer?

Mr. Vergeer: I am going into the question of what Mr. Brink did and what Mr. Brink was thinking because this was gone into, the question of what Mr. Brink's opinion and belief was at the time. I will show a different course of conduct as to the Girard Insurance Company and as applies to the State Farm Mutual Company. Counsel has gone into it on direct examination, Your Honor.

The Court: What was the last question, please?

(Last question read.)

The Court: You may inquire.

Mr. Vergeer: Q. They did refuse coverage?

A. Yes, by telephone. Mr. Wilcox and I talked the matter over on the telephone.

Q. What I wanted to get straight, Mr. Brink, is just how they refused coverage? How did they go about it, did they write you a letter?

A. They did not write me a letter. As I recall, Mr. Wilcox, their agent in Hillsboro, talked to me on the telephone.

Q. I see.

A. Now, I could examine my file but I am almost certain that they did not write me a letter.

Q. Now, then, after they had done this, after the agent informed you, what did you do when you received the Summons and Complaint?

A. I wrote the agent a letter.

Q. And, did you send him a copy of the Summons and Complaint? A. I did not.

(Testimony of Mervin W. Brink.)

Q. You did not. Did you ask him to defend the lawsuit?      A. I did not.

Q. And, that in spite of the fact that he told you that there was no coverage?

A. That's correct.

Q. All right. Now, as to the State Farm Mutual did you ever ask them to defend this lawsuit?

A. I did not.

Q. And, you never sent them any copies of Summons or Complaint or gave them to Mr. Engel or anything like that?

A. I did not, Mr. Vergeer.

Q. Now, Mr. Brink, in your first discussion with Mr. Engel wasn't it a statement by Mr. Engel that in his opinion this man was using his car in the course of the garage business and that if that were so there would be no coverage?

A. Well, I would like to say that that was the case but I can't do it. I——

Q. I want you to say only what you remember.

A. My recollection of it is that "We are not on it. We have a policy exclusion."

Q. On the theory that the man was in the course of the garage business?

A. That's right. And, Ed was going to law school then and he was—it was an academic matter later that we discussed, that's why I got that policy out and I told him in my opinion I thought it was—the company was——

Q. Now, in spite of what Mr. Engel told you you

(Testimony of Mervin W. Brink.)

were of the opinion that the company had liability in the matter to Mr. Brock?

A. I was uncertain in my own mind at the time of the first discussion as to whether they did or not because I had not at that time looked at the garage exclusion policies. Subsequently I became convinced in my own mind after looking at one that under the circumstances of the case the State Farm Mutual did have coverage on it.

Q. All right. Now, this was on your first conversation within a few days of the time of the accident, isn't that right?

A. Well, which phase of it are you relating to?

Q. This first conversation with Mr. Engel that you referred to that we have been talking about.

A. Yes, it was.

Q. And, after that, however, you did have further discussions with Mr. Engel on the question of whether the company should be liable or should not be liable under their policy?

A. Yes.

Q. I mean, that didn't close the matter out between you?

A. No. As a matter of fact, the day that Mr. Brock's deposition was taken Mr. Engel came into my office and I mentioned to him that the deposition was being taken and that he might be interested in it and, as I recall, he went over to the Court-house and sat in on it or was in the courtroom when it was taken.

Q. Now, referring to this first conversation, Mr.

(Testimony of Mervin W. Brink.)

Brink, do you recall, of course, when your deposition was taken in your own office?

A. Yes. I believe that I said the first time I talked with him then was the 5th or the 9th, somewhere along there, of June.

Q. Well, I don't care about the exact day, you understand? A. But, it was——

Q. But that was on April 9, 1955, early this year. You recall that? A. Yes.

Q. And, at that time you were asked about this first conversation and you were asked, "Did you write any letters or have any conversation with the representative of the State Farm Insurance in Hillsboro, Mr. Hines—no. I have the wrong pages. You had explained that he had been standing in the doorway of your partner's office—— A. Yes.

Q. ——and you saw him there and you were asked—you offered to explain the thing to the parties present and your explanation was as follows: "All I know about State Farm in respect to this thing is Ed Engel was out here on a case this office was interested in or a couple of cases, I don't remember, at that time. He was sitting in Bill Schwenn's office and he was down there and was standing in the doorway talking with Bill when I came out of my office. At that time we were kind of kidding him about the Brock case, about State Farm being interested in that, because it was my understanding State Farm had liability on the Lafky car. He said, 'No, we are not on that case.' Generally, I said I thought perhaps they were and



(Testimony of Mervin W. Brink.)

he said, 'No, I have taken a court reporter out there and taken a statement from Mr. Brock and in my opinion we are not liable.' " Is that what he said?

A. Well, Mr. Vergeer, I don't remember whether that is what he said or not but, as I have said, the conversation was substantially along those lines. I can't remember the exact language. If I——

Q. No——

A. That is what I must have said in the deposition you are reading from.

Q. Yes. You said this. Of course, you don't deny saying this? You don't deny saying what is here?

A. Oh, no.

Q. Now, Mr. Brink, further with respect to a further conversation between you subsequently "\* \* \* probably around September or the fall of that year, and we were discussing the settlement of another lawsuit in which I was interested in. Just the two of us were present and at that time we again discussed the question of liability in connection with this thing and he said to me it was his opinion the State Farm wasn't liable under the facts as he had them and from the statement he had taken from Mr. Brock." Is that the way he put it to you?

A. Well, as I remember it that probably is right. I mean, he expressed the opinion that the company was not on it and I expressed the opinion that I felt they were.

Q. Well, in that——

A. Now, as to—now, as to the question of

(Testimony of Mervin W. Brink.)

whether Ed ever said directly it's just my opinion that we are not on it or whether he said we are not on it I can say this that he expressed to me the opinion of the company that the company was not on it. I use the word "opinion." He said, "We are not on the case. We have a policy exclusion."

Q. Yes. And, that was based, as you understood it, upon his understanding of the facts, is that right?

A. That was the initial conversation. Certainly, upon his understanding of the facts and the law as related to the exclusion.

Q. And, the further statement which was not asked you but which was a statement you volunteered here "Just the two of us were present and at that time we again discussed the question of liability in connection with this thing and he said to me it was his opinion the State Farm wasn't liable under the facts as he had them and from the statement he had taken from Mr. Brock."?

A. Yes, that's what I said.

Q. And, that is your best recollection, isn't it?

A. That was my best recollection at that time, certainly.

Q. Now, then, when you received this Complaint and Summons you still felt the State Farm Mutual was on the case?

A. Duane, I felt this way about it: I felt that Girard had coverage primarily and that under the factual situation as Mr. Brock had recited them to me that the garage exclusion wouldn't apply and that the State Farm would be secondarily liable.

(Testimony of Mervin W. Brink.)

That was my personal feeling about it. The Girard had refused to defend the case and Mr. Engel had notice of what was going on in the case so I went ahead and defended it. I filed an Answer and did defend the case.

Q. And, however, in view of the fact that you knew there was some question existing between you, a question of fact, as to whether this man was in the course of the garage business, you did not tender the defense to the State Farm Mutual?

A. You mean by tendering a defense——

Q. Asking them to defend it.

A. Did I come out and ask them to defend it? I did not.

Q. Mr. Brink, is it possible that the reason you did not ask the State Farm Mutual to defend in this case is because Mr. Brock told you that he was testing the car at the time of the accident?

A. No.

Q. It isn't a fact that he told you that he was in the course of the garage business at the time and you felt that State Farm shouldn't be on it and that you therefore did not tender the defense to them?

A. No, that is not correct. That's not the reason why.

Mr. Vergeer: That's all.

### Redirect Examination

By Mr. Cosgrave:

Q. Mr. Brink, you wouldn't be here as a lawyer testifying if what Mr. Vergeer is suggesting to a

(Testimony of Mervin W. Brink.)

fellow attorney were in any way true, would you? In other words, if some such admission had been made you wouldn't be here testifying as you are now?      A. Mr.—

Mr. Vergeer: I object to the question, Your Honor. It calls for a conclusion. It passes upon a question that is properly a question for the jury.

The Court: I don't believe that the question has any probative value concerning any inquiry here. It may have some other relationship.

Mr. Cosgrave: No further questions.

Mr. Vergeer: Thank you.

(Whereupon the witness was excused.)

\* \* \* \* \*

### MERVIN W. BRINK

previously produced as a witness on behalf of the plaintiff, previously sworn, was further examined, and testified as follows:

#### Direct Examination

By Mr. Cosgrave:

Q. Mr. Brink, having been previously sworn, I will ask you now whether Edward Engel, the adjuster for the defendant, State Farm Mutual Insurance Company, ever made any statement to you to the effect that he did not have authority to deny coverage or liability.      A. In this case?

Q. In the case of the accident which you were defending and in this case?

A. No, I recall no such statement.

(Testimony of Mervin W. Brink.)

Q. And, if he had made such a statement would you recall it?           A. Well——

Mr. Vergeer: Well, I object to that, Your Honor.

The Court: Yes. That's purely conjecture.

Mr. Cosgrave: Very well.

Q. Did Mr. Engel ever make any statement to you to the effect that his authority was limited? I mean now authority with respect to binding the company, I do not mean authority with respect to how much he could go in settlement.

A. There was no discussion between Mr. Engel and myself about his authority in this case that I can remember.

Q. All right. Is it or is it not a fact, Mr. Brink, that attorneys and adjusters discuss frequently the matters of authority as meaning the amount to which an adjuster is authorized to go by his company in payment?

Mr. Vergeer: I think, Your Honor, that we are now going afield from the proposal of the evidence and that it doesn't lend anything to this case.

The Court: I will sustain the objection.

Mr. Cosgrave: Well, perhaps I could ask it a different way.

The Court: Very well.

Mr. Cosgrave: Q. I will ask you, did you ever discuss with Mr. Engel on this case or other cases authority insofar as that relating to the amount that his company was willing to pay?

A. Yes, I have.

Q. And, did that refer only to the amount?



(Testimony of Mervin W. Brink.)

A. Well, yes, I guess you could put it a straight "yes" answer.

Mr. Cosgrave: All right. No further questions.

Mr. Vergeer: I have no questions.

Mr. Cosgrave: Thank you, Mr. Brink.

The Court: That is all. You may step down.

The Witness: May I be excused?

Mr. Cosgrave: As far as plaintiff is concerned you may be excused.

The Court: The parties have indicated that you may be excused.

(Whereupon the witness was excused.)

\* \* \* \* \*

### RALPH THOMISON

produced as a witness on behalf of the plaintiff, being first duly sworn, was examined, and testified as follows:

#### Direct Examination

By Mr. Gardner:

Q. Will you state your name again to the jury, please? A. Ralph Thomison.

Q. And, would you spell the last name for the Court Reporter?

A. (Spelling) T-h-o-m-i-s-o-n.

Q. And, where do you live, Mr. Thomison?

A. At 406, Route 4, Hillsboro.

Q. And, about how far is that from Mr. Brock's shop?

A. Oh, I'd imagine between three-quarters of a mile and maybe a mile.

(Testimony of Ralph Thomison.)

Q. How long have you lived in the Hillsboro area?  
A. Since '47.

Q. Do you own property near the Hillsboro—  
A. I do.

Q. And, what type of property is it?

A. I have a garage building and then I have a farm—a nut farm of 12 acres.

Q. And, could you tell us whether or not you rent the garage building to Mr. Brock?

A. I do.

Q. On occasions have you worked for Mr. Brock?

A. Yes; at times when I had time to get away from home, he got snowed under, or something like that.

Q. Yes. And, on this filbert farm that you have, this 12 acres, do you have any chickens?

A. I do.

Q. How long have you known Mr. Brock?

A. Well, let's see—I think I first met him in either '47 or '48, I wouldn't say. Anyway, it was around that.

Q. Yes. Now, Mr. Thomison, will you recall back to May 22, 1953? As I understand it, that was the date of the accident between Mr. Oslund and Mr. Brock?

A. Yes. I remember I didn't—I couldn't recall just the date but I remember the incident when it happened.

Q. Do you recall whether or not Mr. Brock came out that afternoon to see you?

(Testimony of Ralph Thomison.)

A. Yes—well, he was out to the place, came out after some eggs, get some eggs from me.

Q. Do you recall about what time it was that he came out to get some eggs?

A. Oh, now, let's see—it just seems to me like it was afternoon but I couldn't say for sure. But, I believe it was afternoon. But, as far as the time of day I couldn't recall because I just went to the house long enough to get him the eggs and then he went on. That's—

Mr. Gardner: I think that's all of this witness, Your Honor.

Mr. Vergeer: I have no questions.

The Court: That's all, sir. You may step down.

(Whereupon the witness was excused.)

\* \* \* \* \*

### EDWARD I. ENGEL

produced as a witness on behalf of the defendant, being first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Vergeer:

Q. Will you state your name for the jury?

A. Edward I. Engel.

Q. Where do you live, Mr. Engel?

A. 12654 Northeast Hassalo, Portland.

Q. How old are you?           A. I am 29.

Q. How long have you been a resident of this area?  
A. All my life.

Q. Are you married?           A. Yes, sir.

Q. By whom are you employed?

(Testimony of Edward I. Engel.)

A. State Farm Mutual Automobile Insurance Company.

Q. How long have you been employed by that company?

A. A little over three and a half years.

Q. In what capacity?

A. Claims adjuster.

Q. Now, you say three and a half years?

A. Yes.

Q. And, when were you first employed by them, if you recall?

A. In March of 1952.

Q. So, along about May, 1953, you had been employed by the company approximately a year, is that right?

A. That is correct.

Q. Now, Mr. Engel, what are your duties?

A. My duty is to investigate accidents, take the reports from the insureds and go out and find out how the accident occurred and attempt to determine where the liability rests for the accident and, also, upon authority granted me by the company, to make settlements.

Q. When you say, "upon authority granted you by the company," is that a general authority or is it specific authority in each case?

A. It's a general.

Mr. Cosgrave: Just a moment. I don't mean to interrupt so early but I think, Your Honor, any limitation that the company might have on his authority would not be material, the only thing that is material is what authority he apparently had when he went out to see these people.

(Testimony of Edward I. Engel.)

The Court: May I have the question again?

(Question read.)

The Court: I think it calls for a conclusion of this witness.

Mr. Vergeer: Well, Your Honor, I may say this: what I want to have the witness explain is whether he is given specific authority to settle a particular case and when he acts only upon that authority or whether he has a general authority which would permit his discretion to be used within whether he should settle a case.

The Court: I would suggest that it would be beneficial to the jury if you would ask the witness to testify to his version of what his instructions were.

Mr. Vergeer: Yes.

The Court: Then let them determine whether that was restricted or general.

Mr. Vergeer: Very well, Your Honor. This, of course, will be tied in with a number of dealings with Attorney Brink and it's for that purpose.

The Court: I understand.

Mr. Vergeer: Q. Now, what were your general instructions with relation to handling of claims?

A. Well, I can settle all material damage losses, material damage loss being a loss that the policyholder himself is involved in by himself, and all property damage loss. I have an unlimited authority insofar as those things are concerned. As far as the personal injury coverage is concerned I have to re-



(Testimony of Edward I. Engel.)

ceive that authority from my superintendent of claims, Mr. Frank O'Connor.

Q. In the course of the first year you were employed by the company did you have occasion to see Mr. Mervin Brink with respect to claims?

A. You mean prior to this accident the case is about?

Q. Yes. A. Yes, sir.

Q. Would you give us some idea as to how many claims you handled with Mr. Brink during that time?

A. I would guess approximately six to eight personal claims in that first year.

Q. And, in the course of that time was there any discussion between you and Mr. Brink as to your authority?

A. There were numerous discussions regarding it.

Q. Numerous discussion. And, did you at any time outline to him what your limitations were?

A. Yes. Mr. Brink, an active plaintiff's attorney—a good attorney—and he was always—

Mr. Gardner: We will object to that question, it's not responsive.

Mr. Cosgrave: Objection.

Mr. Vergeer: We would—

The Court: Of course, the jury isn't particularly interested in any witness' appraisal of any of the attorneys that might be called as witnesses. We can just assume that the witness was acting in good faith when he made the voluntary statement. But,

(Testimony of Edward I. Engel.)

members of the jury, this witness' appraisal of the attorney involved is not a matter of issue in this Court at all.

Mr. Vergeer: Your Honor, I had another matter. Thank you, Your Honor. I would suggest, to avoid confusion, if I may, that the Court limit the objections or any other statements made by opposing counsel to a single attorney.

Mr. Cosgrave: Your Honor, that was inadvertent. We were both speaking at the same time about the same thing.

Mr. Vergeer: Would the Reporter read the last question and answer, please?

The Court: I think perhaps counsel is entitled to have an answer to his question made. To avoid confusion, any feelings about it, I would suggest that the attorney who intends to cross-examine this witness interpose all objections.

Mr. Cosgrave: Yes. We have just determined that, Your Honor.

(Last question read.)

The Witness: Your Honor, I don't know exactly how to phrase so that it isn't objectionable but in any settlement negotiations with attorneys on personal injury cases, personal injury cases are something that fluctuate to a great degree. We get demands and make offers and there is a good deal of horse trading going on insofar as the business is concerned. In fact, that's the way we actually settle them. In the course of these negotiations Mr. Brink

(Testimony of Edward I. Engel.)

would ask me what my authority was insofar as a specific case was concerned——

Mr. Gardner: Your Honor.

The Witness: Is that responsive?

The Court: No. I think that your counsel asked you what your conversations with Mr. Brink were with reference to this case.

Mr. Vergeer: Q. Did you ever outline to Mr. Brink the extent and limitations of your authority?

A. In this particular case here?

Q. Yes. A. Yes.

Q. Prior to this case coming up?

A. Prior to the case being filed, prior to the accident being filed?

Q. Prior to this matter coming up at all.

A. You mean after the accident? [27]

Q. No, sir. I mean prior to anything relating to this matter coming up.

A. Yes. He knew that I was an adjuster and as such my authority was limited and he has been advised.

Mr. Gardner: Your Honor, I think I will have to object to that. He is stating a conclusion as to what he says the other man knew——

The Court: Yes.

Mr. Gardner: ——not as to what he told him.

The Court: Yes. The objection will be sustained and the jury is instructed to disregard the witness' statement that "he knew what my instructions were."

The Witness: Well, I told Mr. Brink what my

(Testimony of Edward I. Engel.)

authority was in various cases. We had a lot of conversations during that year's time.

Mr. Vergeer: Just answer the question, Mr. Engel.

Q. Now, when did you first discuss this claim of Mr. Oslund against Mr. Brock or the Brock accident with Mr. Brink?

A. The same day that I took the Court Reporter's statement from Mr. Brock.

Q. And, at that time what was your conversation with Mr. Brink?

A. Well, I went over to his office and he was there and so I went in to see him and I walked in the door and told him that I had just taken a Court Reporter's statement from Mr. Brock and Mr. Brink said, "That son-of-a-gun, I told him not to talk to anybody about it." So, we sat down and talked a little bit about the accident and he broke out an insurance policy which he had, I think it was a policy on his own personal car, was looking at it, and asked me questions about the Omnibus clause of the insurance policy, permits of use provision.

Q. Yes. And, did you have any discussion with him at that time as to whether or not the State Farm Mutual policy which had been issued to Mr. Lafky would be applicable in Mr. Brock's favor?

A. I told him that it was my impression that Mr. Brock was in the course of his garage business at the time that the accident occurred and that if

(Testimony of Edward I. Engel.)

this were so that there would be no coverage with State Farm Insurance Company.

Q. Did you tell Mr. Brink that the State Farm Mutual Insurance Company would not cover Mr. Brock? A. No.

Q. When did you again see Mr. Brink, if you recall?

A. I saw Mr. Brink—well, I have seen him a number of times since that initial conversation. I just saw him here two weeks ago on another case. They have a large number of automobile accident cases in their office and the next time that I saw him was perhaps two weeks after that initial conversation.

Q. Well, let me ask it this way: When did you next discuss the Brock accident with him?

A. I think about two weeks after that initial conversation I talked to him about it again briefly.

Q. And, what was the gist or the nature of that conversation?

A. Well, he said that he was representing Mr. Brock or he told me that prior to that time and about all we talked about at that time was the fact that he was mad at Mr. Gardner for——

Q. Well, just leave that portion of the conversation out.

A. That was about the size of the conversation so far as my recollection is concerned.

Q. Well, when, if any time, did you next discuss the question of whether there would be coverage for Mr. Brock under the State Farm Mutual policy?



(Testimony of Edward I. Engel.)

A. I don't recall talking to him specifically about that. I recall settling a number of other cases with him after that time, but as Mr. Cosgrave read from my memos, that, to me, it seemed like Mr. Brink was avoiding the subject because he didn't say anything about it.

Q. Now, did you, Mr. Engel, ever have a discussion with Mr. Brink—I mean now within two, three, or four months of the time of the accident—did you have any discussion with Mr. Brink as to your authority to either admit or deny coverage under the policy?

A. I advised Mr. Brink immediately that I had no authority to deny coverage on behalf of the company.

Q. Did you at any other time discuss whether the company would—and again I am referring within two, three, or four months after the accident—let's say four months or at any time prior to the trial of the case of Oslund against Brock—did you ever tell him that the company would not cover Mr. Brock under the policy issued to Mr. Lafky?

A. No. No. I never denied coverage on behalf of the company. I attempted to take a—as I recall now I attempted to take a non-waiver agreement from Mr. Brink on our first meeting advising him that there was a policy defense and that the company reserved all rights to investigate the accident and the right to be advised of what was going on.

Q. Yes. And, the company reserved its defense as such it might be under the policy?

(Testimony of Edward I. Engel.)

A. Right.

Mr. Gardner: I object to that, Your Honor. The question asked for a conclusion, "And, the company reserved its" rights to this, that, or the other.

The Court: May I have the question read, please?

(Last question and answer read.)

The Court: I think that the final question assumes something "And, the company reserved" assumed something the witness has not testified to.

Mr. Vergeer: Your Honor, I didn't mean to imply the conclusion but merely had reference to this conversation and not to the conversation as a conclusion which is pretty hard to separate at that point, I realize.

The Court: There was a statement, members of the jury, by counsel "And, the company made the reservation," or words to that effect. I think that was just the attorney's anticipation of the conversation with the witness. There has been no testimony that there was any reservation of any kind between the parties.

Mr. Vergeer: Very well.

The Court: So, I think they understand now.

Mr. Vergeer: Q. Now, what, if any, conversation did you have with Mr. Brink as to this policy defense?

A. I advised Mr. Brink that Mr. Brock was a garage owner, that he had taken——

Mr. Gardner: Your Honor, I think I would object to this. He has asked him what conversations,

(Testimony of Edward I. Engel.)

if any, and, as I understand, for the conversations to become material you have got to lay the time and the place and the date. We have no way of knowing what conversation he is thinking about. We have no way of checking it when he doesn't set any time or place or what the conversation was.

Mr. Vergeer: Your Honor——

The Court: Could you supply the information?

Mr. Vergeer: This is not an impeaching question.

The Court: I understand that. I think that there has been testimony by the witness, Brink, that he had several conversations, and he gave testimony as to what transpired. This witness certainly can give his version but I do believe counsel is entitled to know what conversation you are talking about.

Mr. Vergeer: Well, if they can be segregated.

The Court: If they can't, they can't.

Mr. Vergeer: Will the Reporter read the question?

(Last question read.)

Mr. Vergeer: Q. And, if you can would you please add the approximate time when this conversation took place?

A. The afternoon; I believe it was May 27, 1953, which is—if that is the same date that I took the Court Reporter's statement from Mr. Brock which has been entered as an exhibit, I believe. That date may be a few days off. Anyway, immediately after taking the Court Reporter's statement from Mr. Brock I went to Attorney Brink's office,

(Testimony of Edward I. Engel.)  
advised him that there was a policy question insofar as the accident is concerned due to the occupation and the use of the vehicle by Mr. Brock. I attempted to take a standard form non-waiver agreement from Mr. Brink to the effect that the company reserved the right—pardon me. It starts out advising them that there was a policy question and that the company reserved its rights to continue investigating, attempting to settle, to defend any lawsuit, to adjust or handle any claim without waiving any of its rights. Now, Mr. Brink refused to agree to that and he didn't want to sign it and so we argued around about it for a while and I told him also at that time that I had no authority to deny coverage and the company hadn't made up its mind as to whether or not they were going to deny coverage on it.

Mr. Vergeer: That's all. You may inquire.

### Cross Examination

By Mr. Gardner:

Q. Now, Mr. Engel, at the present time, as I understand it, you are an attorney?

A. That is right. I am newly admitted as a member of the Oregon Bar.

Q. And, during the time that you were working on that Brock accident you were a third-year law student or fourth year?

A. No. I was a second-year law student.

Q. Now, Mr. Engel, did you have any conver-

(Testimony of Edward I. Engel.)

sations in the course of your investigation with Mr. Lafky?

A. Yes, I had several occasions—several conversations with Mr. Lafky.

Q. And, when did you have the first?

A. I think it was either a day or two after I had taken the Court Reporter's statement from Mr. Brock. Now, I am kind of using that as a guide. That's insofar as dates are concerned.

Mr. Vergeer: If the Court please, this, of course, is not cross-examination. This is now counsel making this witness his witness, I believe, and is entering into a matter not covered in the direct examination and I believe that counsel has closed his case. Under these circumstances I think it would be improper to prolong your inquiry.

The Court: May I have the question?

(Last question read.)

The Court: There wasn't any direct testimony concerning the conversation of this witness with Mr. Lafky.

Mr. Gardner: Q. Well, Mr. Engel, did you deny coverage on the part of your company?

A. No.

Q. Mr. Engel, do you recall your deposition having been taken in the State Court on August 17, 1954, in the office of your attorney, Duane Vergeer?

A. I recall that deposition being taken.

Q. Do you recall a question being asked you—

Mr. Vergeer: What page?

Mr. Gardner: Page 17.



(Testimony of Edward I. Engel.)

Mr. Vergeer: 17.

Mr. Gardner: Q. "Q. Do you remember having a conversation with Mr. Lafky? I can't lay the exact time in which you told him you would defend if an action was brought against him, but you would not defend Brock because you did not believe your policy covered Brock? A. It was my opinion, as I said before, from the outset involving this accident"—

Mr. Vergeer: If the Court please.

The Court: Let counsel finish his question.

Mr. Vergeer: Very well.

Mr. Gardner: Q. "A. —regarding this accident that Brock would not be covered in my opinion and I also advised Mr. Lafky of that, that I didn't think Brock would be covered. However, I did tell Mr. Lafky in any event he was our named insured and we would cover him in case of a lawsuit being brought against him."

A. That—

Mr. Vergeer: Now, just a moment, please.

The Court: Just a moment.

Mr. Vergeer: My objection will be the same.

The Court: This witness testified he never denied liability on behalf of the company.

Mr. Vergeer: I beg your pardon but, Your Honor, denial of liability to have any probative value in this case or be at all material to the issues in this case would have to be made to either Mr. Brink or Mr. Brock otherwise it would have no effect whatsoever.

(Testimony of Edward I. Engel.)

The Court: May I have——

Mr. Vergeer: I will withdraw my objection. It's all right.

The Witness: I don't believe you finished your question.

Mr. Gardner: Well, would you read back the last of what I said?

(Last quoted answer was read.)

Mr. Gardner: Q. Now, continuing from the deposition in the State Court, the next question asked you: "When did you tell him that? A. I think I told him several times. Q. When do you recall the first time? A. The first time I talked to him? Q. What about the second time? A. I might have mentioned it again. We discussed the problem several times. I know I referred to that the first time I talked to him. That is the only definite date I can recall. Q. Do you recall any of the other times? A. That is, a problem or question that arose and we had several conversations. I would say it arose most of the time I talked to him. We probably had three or four different conversations in the period of six weeks after the accident and, then, I didn't see him for a long time after that particular point." Do you know what date the Complaint was filed in the Circuit Court case of Oslund versus Brock?

A. Is this a different question or are you continuing?

Q. This is a different question.

A. You didn't ask me to answer the first one.

(Testimony of Edward I. Engel.)

Q. I did not ask you that on the deposition. This is leaving the deposition and I am now asking you the question do you know the date the Complaint was filed in the Circuit Court case in Washington County of Oslund versus Brock?

A. No.

Q. Mr. Engel, did you just testify a moment ago that at no time prior to the time the case was filed or tried that you had not denied coverage to Mr. Brink?

A. I testified, that is correct. I testified that I did not deny coverage at any time to Mr. Brink.

Q. Didn't you also just before the Complaint or lawsuit was filed or the judgment?

A. I was referring to the current lawsuit that we are trying here now today which Mr. Vergeer had requested me to answer to the one that we are involved in.

Q. Now, Mr. Engel, referring back to your question that you did not deny coverage at any time, and I am quoting from page 31—

Mr. Vergeer: What deposition?

Mr. Gardner: That's the Federal deposition.

Mr. Gardner: Q. "Q. Do you recall whether or not the first time you contacted Mr. Gardner you discussed the question of whether or not State Farm covered the accident? A. I think that that topic came up in our conversation. Q. Do you recall whether or not you told Mr. Gardner that there was a policy defense? A. I think I did tell Mr. Gardner that in my opinion there was a policy defense.

(Testimony of Edward I. Engel.)

Q. Do you recall whether or not you told him that the policy defense was that—was the—the accident had happened allegedly as a result of the operation of the garage and there was an exclusion to that effect? A. I believe I did tell Mr. Gardner that in my opinion this loss was not covered under the policy.” Did you make that statement?

A. I advised Mr. Gardner that my opinion due to the apparent use of the vehicle as the facts were reported to us at the time the accident occurred that in my opinion there was no coverage.

Mr. Gardner: I think that’s all of this witness, Your Honor.

The Court: Redirect.

### Redirect Examination

By Mr. Vergeer:

Q. By Mr. Engel, referring again to the deposition taken in the State Court concerning which you were first asked, page 20, were you asked the following questions at that same time very shortly thereafter and did you give the following answers: “Ed, did you ever tell Mr. Lafky, tell or inform him in any manner at all or Mr. Brink as Mr. Lafky’s attorney that the company could not cover Mr. Lafky in this loss or would not defend him? A. I did not advise either” Mr. Brink—or, “Mr. Lafky or Mr. Brink that the company would refuse to defend Mr. Lafky if suit were filed against him.” Then there is some redirect examination by Mr. Gardner. “Q. Just one other question. When did

(Testimony of Edward I. Engel.)

you tell Brink and Brock that you had no authority to deny coverage? A. Mr. Vergeer asked me if I had told—I did not tell Brock that because I did not discuss the coverage question with Mr. Brock whatsoever. The minute I found out he was represented by counsel——

Mr. Vergeer: Pardon me. Did you ever tell Mr. Lafky—or, I misstated that. I meant to use the word ‘Lafky,’ not the word ‘Brock.’ I know Mr. Engel had no discussion with Mr. Lafky except the one reported discussion. Mr. Gardner: You

mean Mr. Brock? Mr. Vergeer: The one reported discussion with Mr. Brock is the only one. My question was whether he advised Mr. Lafky and Mr. Brink of this matter. Q. When did you advise Mr. Brink that you had no authority to deny coverage as to Mr. Lafky or Mr. Brock? A. At

the outset. The question came up in our initial conversation. Q. When was that? A. Sev-

eral days after the accident happened. It was the same day I took the reporter’s statement. I do not recall the exact day.” Were those questions and answers given at that time?

A. Yes, sir.

Mr. Vergeer: That’s all.

The Court: That’s all, sir. You may step down.

Judge’s Ruling in Plaintiff’s Motion for New Trial

The Court: Well, of course, our impressions immediately following the trial, naturally, would be



somewhat better than they are at this moment. But, after having heard the arguments of counsel it has pointed up the impressions of memory.

As we were saying immediately following the trial you would have the feeling of the trial, the sense of the trial is still with you, you are conscious of the rulings that you have made. Reflecting on them during the course of the trial, awaiting the return of the verdict, you naturally search the state of your mind with the matter and then following the receipt of any verdict you have an impression one way or the other. And, I am frank to say at the end of receiving the verdict I had the impression that both parties had had a fair trial without having any particular feelings about the way it went. I can well imagine that any disappointed litigant feels that an injustice has been had.

On the other hands there are two questions involved, that is, fundamental questions involved in the trial, one which was by the nature of a forfeiture, and the other was really to the merits of the matter. The failure of Brock to forward the Summons and that sort of thing are, in my mind, in the way of a forfeiture forfeiting whatever rights he may have had by reason of his own action. The question on the merits that were involved was what was the nature of the use of the car at the time of the accident. That went to the very merits. The policy was in effect in determining whether or not liability existed under the policy. I

think that I would have had some doubt in my mind as to what the course of the action of the jury was if we did not have the special interrogatory that we had. When the jury stated an answer "Yes," as to "Was the car being used in the operation of a garage," answered in the affirmative to that question, that by the very nature of things showed that the jury had gone to a determination of that question of merit and under the instructions to them they would never have gotten to that question of the merits or liability if they had determined that there had not been a waiver of the provision of the policy by the insurance company.

So, that must necessarily mean to us that they concluded under the evidence, first, as to the instruction that there was a waiver of the notice provision by the insurance company otherwise they would have not followed the instruction of the Court and even gone to the question of liability.

So, it's conclusive that they did go to the question of liability and any error that might have been submitted by the Court with reference to the waiver question is a question so far as this jury is concerned. Now, it's true the defendant had the burden of proof in connection with the use of that car and the jury was so instructed, but bear in mind they are entitled to the benefit of the plaintiff's evidence and it's in their benefit as much as the evidence directly produced by them in their case in chief.

Now, one of the fundamental questions is the

weight of any evidence and it was for the jury to determine the credibility and the effect and the weight of the evidence of the various witnesses. It was the position of the defendant throughout the trial that all of these witnesses were interested parties because they had an interest in the outcome of the cause and, most certainly, that was true with reference to Brock. If the plaintiff prevailed he was relieved of a very burdensome judgment. If the plaintiff did not prevail then he had a grievous verdict against him that was to him. So, he had a very high interest in the case and the defendant is entitled to his demeanor on the stand, his conduct in the courtroom, and in the presence of the jury and the way and mode of his testimony, and most certainly it would be substantive evidence so far as the credibility of the witness is concerned, the showing of any impeaching question. It may be that it wouldn't be substantive evidence of that fact itself but it certainly would tend to destroy the effect and credibility in whether or not the jury would believe any given witness by reason of prior contradictory statements made under facts and circumstances to be weighed by the jury. So, I can understand plaintiff is aggrieved but on the other hand all that the Court can say is that it's going to be unjust, any verdict is going to be unjust until the plaintiff prevails and the Court cannot in its conscience make that determination. And, after hearing the able statements of counsel in refreshing my memory I will abide by the decision. The motion will be denied.

Mr. Gardner: Could we have an exception to the ruling?

The Court: Yes, indeed you may.

[Endorsed]: Filed Nov. 28, 1955.

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[Endorsed]: No. 14981. United States Court of Appeals for the Ninth Circuit. H. R. Oslund, Appellant, vs. State Farm Mutual Automobile Insurance Co., a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: December 20, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

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In the United States Court of Appeals  
for the Ninth Circuit

No. 14981

H. R. OSLUND, Appellant,

vs.

STATE FARM MUTUAL AUTOMOBILE IN-  
SURANCE COMPANY, a corporation,  
Appellee.

APPELLANT'S DESIGNATION OF RECORD  
AND STATEMENT OF POINTS

Comes now Appellant and adopts Appellant's designation of contents of record on appeal and Ap-

pellants statement of points as appears in type written transcript of record heretofore docketed by Appellant.

MAGUIRE, SHIELDS, MORRIS &  
 BAILEY,  
 GARDNER & REEDER,  
 /s/ By JAMES K. GARDNER,  
 Of Attorneys for Appellant

Certificate of Service attached.

[Endorsed]: Filed December 30, 1955. Paul P. O'Brien, Clerk.

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[Title of U. S. Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF ADDITIONAL CONTENTS OF RECORD

Comes now the Appellee and adopts the Appellee's Designation of Additional Contents of Record on Appeal, as heretofore designated by the Appellee in the typewritten transcript of record heretofore adopted, being the Court's entire instructions to the jury.

VERGEER & SAMUELS,  
 /s/ By DUANE VERGEER,  
 Of Attorneys for Appellee

[Endorsed]: Filed January 13, 1956. Paul P. O'Brien, Clerk.